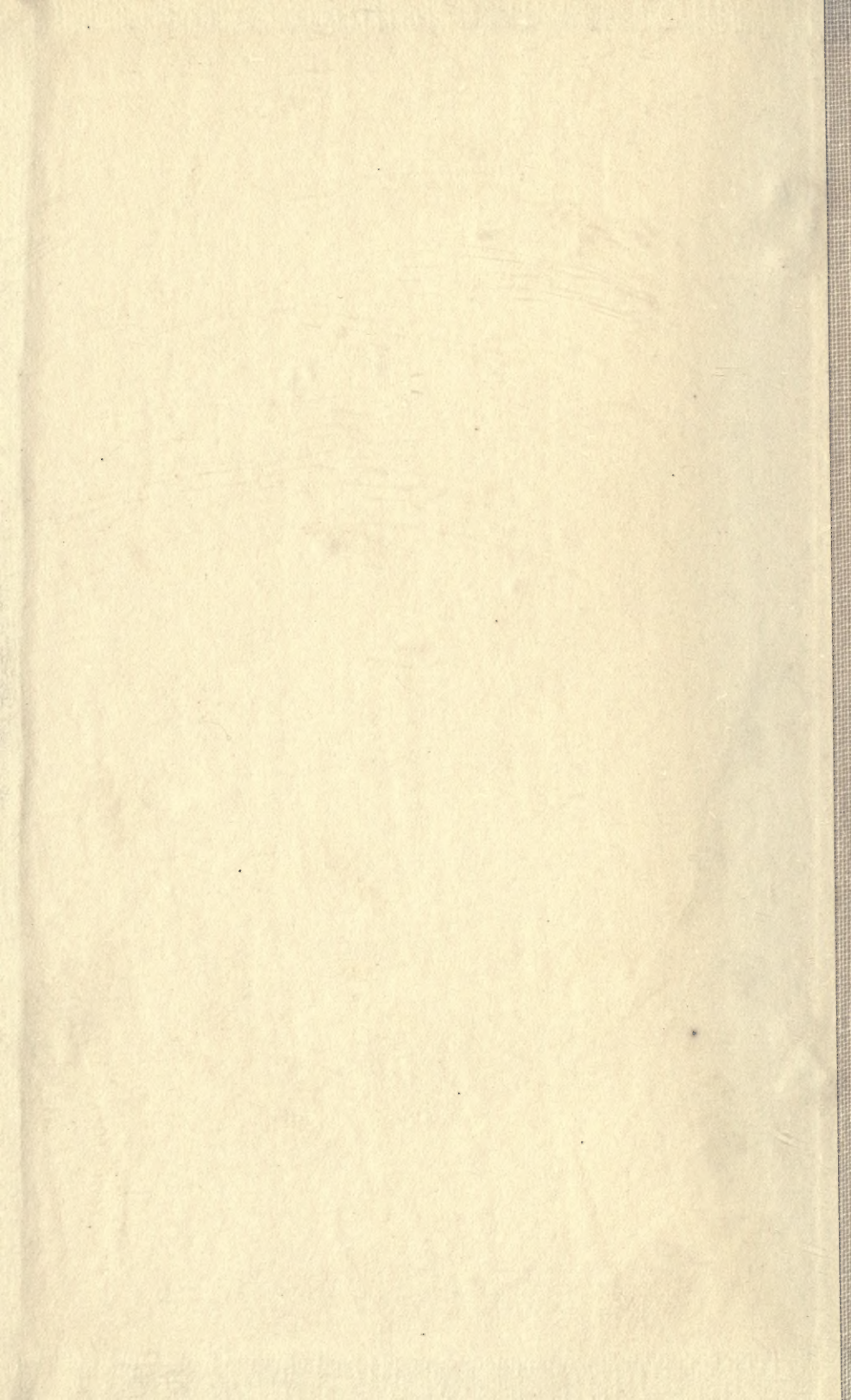
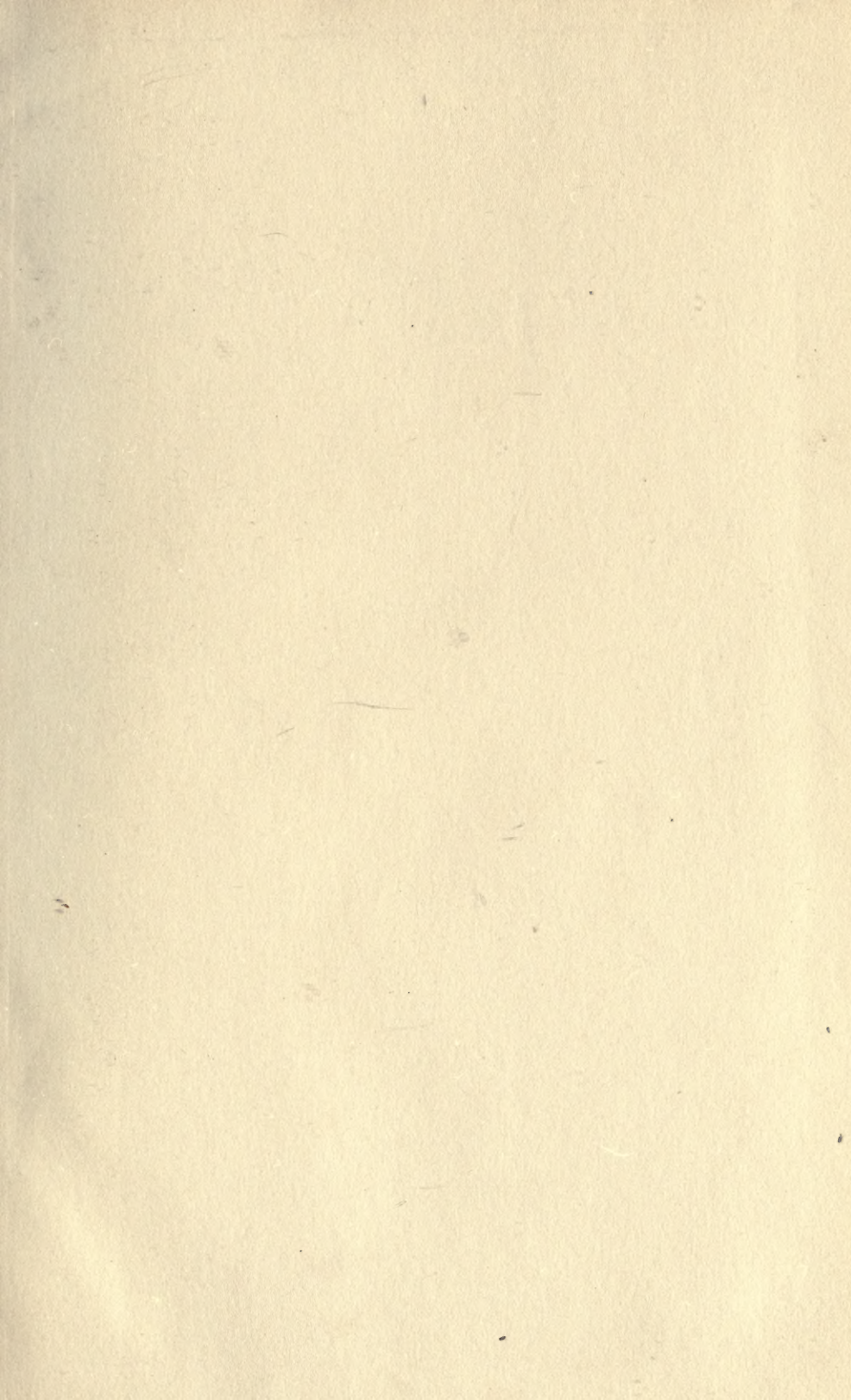




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POWERS IN TRUST AND GIFTS IMPLIED IN DEFAULT OF APPOINTMENT.

POWERS in trust or in the nature of trust are often spoken of in the books.

In a sense, all special or limited powers are fiduciary. They cannot be exercised for the benefit of the donee of the power or of any other person not an object of the power. But this is not what is meant by a "power in trust." A power in trust or in the nature of trust is a power which imposes upon the donee a duty to exercise it, enforceable in equity.

Though "power in trust" is a common, it is not, I venture to think, an exact expression. Two separate things are confounded under it.

A power is an authority to deal with property apart from ownership. It is generally an authority to deal with property owned by some person other than the donee of the power; but a man may be given a power to deal with property which he himself owns. Such a power is called a power appendant.

A power appendant is always destructible by the donee. A man cannot be deprived of the right to deal as owner with property which he owns by giving him a power; and by conveying the property as owner, he is estopped to exercise the power.

When property is given to a man with the provision that he shall have a power to appoint it in a certain way, if this provision creates a trust, the trust is imposed upon him as owner of an estate or interest, and not upon him as donee of a power. If it were im-

posed upon him as donee of the power, since the power is appendant, and all powers appendant are destructible, the trust attached to it would be destructible also.

The man holds his estate or interest subject directly to the trust, and equity does not allow him to deal with his estate or interest in a manner inconsistent with the trust; and this is the result whatever words are used to create the trust; whether the word "power" is used or not. In a case of this kind there may be said to be a power in trust or in the nature of a trust; but the better expression would be that there is a trust in the form of a power.

It makes no difference whether the estate or interest which the man holds is legal or equitable.

The question which arises in this class of cases is whether a provision is simply advice, or whether a trust is created,—the question of precatory trust. This question does not concern us here; if a trust is created, it attaches itself directly to the estate or interest, though it be put in the form of a power.

But there is another class of cases.

A power may be given to a man, the exercise of which does not derogate from his own estate or interest,—that is, which is not a power appendant, but which derogates from the estate or interest of some other person or persons. The donee may have an estate or interest in the property, as when property is given to A. for life, with a power to him to appoint the remainder; this is called a power in gross or collateral. Or the donee may have no estate or interest in the property, as when property is given to A. for life, with a power to B. to appoint the remainder; this is called a power simply collateral.

Is such a power ever a power in trust?

A system of law is conceivable in which equity would compel a donee to exercise such a power or would exercise it for him. In such a system a power of this kind might be properly called a power in trust.

But such is not the system of our law.

When our law thinks that the objects of a power ought to have an estate or interest in the property, although no appointment has been made, it does not compel the donee to exercise the power, nor does it exercise it for him, but it declares that there is an implied gift to the objects of the power in default of appointment.

Sometimes the implied gift is of a legal, sometimes of an equitable estate or interest. Thus, if a legal life estate is given to A., with a power of appointment, the gift implied in default of appointment will be of a legal estate. On the other hand, if an estate is given to trustees, and a power is given to A. to appoint, the gift implied in default of appointment will be of an equitable estate only; but this is not because the power itself is in trust, but because the subject of the power is only an equitable interest. In cases of this second kind, if A. is both owner of the legal estate as trustee, and also donee of the power, there is in default of appointment undoubtedly a trust on his legal estate for the objects of the power, and therefore it is fair enough to say that A. has a power in trust, because a trust is fastened on his estate by reason of the existence of the power. This was what occurred in the earlier cases in which the expression "power in trust" was used. Such was the case of *Brown v. Higgs*,¹ a leading authority, but one which has been a chief cause of confusion on this topic.

That, in cases of the second class, whenever property, in default of appointment, passes to the objects of a power, it passes by implied gift, and not by an exercise of the power, appears from several considerations:

First. Equity never compels a donee to exercise a power of appointment; what it does is to act when he has not executed it.

Second. When a legal estate is given to A. for life, and a power is given to A. or to B. to appoint the remainder, if the objects of the power take in default of appointment, they must take by an implied gift; equity has nothing to do with it.²

Third. The case of *Bull v. Vardy*³ is conclusive to the point that equity does not exercise a power, when there is a failure to appoint. A testator devised certain real estate to his wife, but gave her no other interest in his property. He then went on: "I further empower my wife to give away at her death 1000 *l.*; 100 *l.* of it to T.; 100 *l.* to B.; the other 800 *l.* to be disposed of by her by her will." He made several legacies, and gave the residue to two women named

¹ 4 Ves. 708 (1799), 5 Ves. 495 (1800), 8 Ves. 561 (1803).

² See *Morgan d. Surman v. Surman*, 1 Taunt. 289 (1808); *Halfhead v. Sheppard*, 1 E. & E. 918 (1859); *Tomlinson v. Nickell*, 24 W. Va. 148 (1884); *McGaughey's Admr. v. Henry*, 15 B. Mon. (Ky.) 383 (1854); *Rogers v. Rogers*, 2 Head (Tenn.) 660 (1859).

³ 1 Ves. Jr. 270 (1791).

C. The wife died without making any disposition of the 1000*l.* T. brought a bill against the wife's executor claiming the 100*l.* The bill was dismissed. The court said that where the absolute interest is given to one with any expression that the devisee shall dispose of the whole or a part to a particular person, there a trust is raised for that person which the court will execute. But that here the wife had no interest in the 100*l.* so there was nothing to raise a trust. That is, the court held that this was not a case of the first class above mentioned. The court then considered whether the testator was to be regarded as having made a direct gift to T. They seem to have thought that T. could not take by way of either direct or implied gift from the testator; but whether they were right or wrong in this, they were clearly right in dismissing the bill, for if there was either a direct or an implied gift to T., the bill should have been brought against the testator's executor and residuary legatees, and not, as it was, against the executor of the donee of the power. If the court was attending to the execution of the power, then the executor of the donee was the proper person against whom to bring the bill, but the court says: "It was not argued, that if it was the case of a power, the court could do anything to execute it." That is, that if the objects of a power in gross or simply collateral take upon default of appointment, they take under a direct or implied gift under the will of the original testator, and not by an exercise of the power.

Fourth. If equity really exercised an exclusive discretionary power, it would exercise the full power, discretion and all. This it never does. The estate or interest which is to arise in default of appointment is determined by fixed rules into which no element of discretion enters.

At the end of the seventeenth century, the court sometimes exercised discretion.⁴ But, as Lord St. Leonards says:⁵ "These cases are not now law. . . . Such a power is now disclaimed. The Court never exercises a discretionary power."⁶

⁴ *Carr v. Bedford*, 2 Rep. in Ch. 146 (1715). Cf. *Moseley v. Moseley*, Finch 53 (1673); *Clark v. Turner*, 2 Freem. 198 (1694) (and see *Baker v. Barrett*, there cited); *Warburton v. Warburton*, 2 Vern. 420 (1701), affirmed *Dom. Proc.*, 4 Bro. P. C., Toml. ed., 1; and see *Attorney-General v. Bradley*, 1 Eden 482 (1760).

⁵ Sugden, Powers, 8 ed., 601.

⁶ See *Doyley v. Attorney-General*, 4 Vin. Abr. 485, pl. 16 (1735); *Cruwys v. Colman*, 9 Ves. 319 (1804); *Robinson v. Smith*, 6 Madd. 194 (1821); *Salisbury v.*

It may be said, and it seems as if it must be said, by those who contend that the court is exercising the power, that the rule for giving the property to all the members of the class is not a refusal to exercise the full discretionary power, but is merely in accordance with a rule of convenience for equal division. It is hard to say this in the face of Lord St. Leonards' statement above given.

But there are cases for which this explanation will not suffice.

In *Brown v. Higgs*⁷ there was a power to appoint to one of a class. No appointment. The case was not ripe for decision, but Lord Alvanley, M. R., said that the inclination of his opinion was that it was a mere power. This is approved by Lord St. Leonards⁸ and by Mr. Leake.⁹

In *Little v. Neil*¹⁰ a testator gave a power in favor of one or more of the wife and issue of P., but declared that any provision for the wife should be by an annuity depending on the life of P. The donee declined to make an appointment. Kindersley, V. C., said that the only difficulty he felt was whether, in giving the wife a share in the fund, he ought not to give effect to the direction that she should have only an annuity. He went on:

"But under the present circumstances the court is not exercising the discretion of the trustees nor continuing the settlement; and therefore I cannot do otherwise than direct the fund to be divided equally among the children and grandchildren."¹¹

Fifth. If equity really exercised the power when the donee failed to exercise it, there is no reason why it should not aid the non-execution of a power in a case where it would aid a defective execution. But "it is an immutable rule that a non-execution shall never be aided."¹²

It cannot be denied that in many of the cases, especially the earlier ones, the objects of a power are said to take because the power is in trust, but the distinction between the exercise of a power and an implied gift does not appear to have been in the minds of the courts. Even down to recent times we find a trust

Denton, 3 Kay & J. 529 (1857); *McGaughey's Admr. v. Henry*, 15 B. Mon. (Ky.) 383 (1854).

⁷ 4 Ves. 708, 719 (1799):

⁸ Sugden, Powers, 8 ed., 593.

⁹ Land Law, 391.

¹⁰ 31 L. J. Ch. 627 (1862).

¹¹ See the opinion in this case in full, pp. 29, 30, *post*.

¹² Sugden, Powers, 8 ed., 588.

coupled with a power and a gift by implication spoken of as if they were the same thing.¹³

It was the acute mind of Lord St. Leonards which first perceived that when the objects of a power take upon failure to appoint, they take by an implied gift. In the first edition of his book on Powers, published in 1808, he said:¹⁴

"In *Brown v. Higgs*, 8 Ves. 574, Lord Eldon stated the principle of all the cases on this subject to be, that if the power is a power which it is the duty of the party to execute, made his duty by the requisition of the will put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power."

The important words here are "who has given him an interest extensive enough to enable him to discharge it," and that Lord St. Leonards thought so is shown by the fact that in later editions of the book these words are printed in italics.

In *Brown v. Higgs*, B., a trustee, had the absolute legal estate, and also the beneficial interest for life and a power to appoint the equitable estate subject to his life interest. He made no appointment. It was held that the objects of the power took. Now here I conceive the more exact expression is to say there was an implied gift of the equitable estate to the objects of the power; but as B. had the whole legal estate, there was undoubtedly a trust on that estate for the objects of the power, and therefore it was fair enough to say that there was a power in trust, because the donee of the power was also the owner of the legal estate, and a trust was fastened directly on that estate by reason of the existence of the power.

Lord St. Leonards then went on to consider the cases where the donee of the power has not the whole legal estate. He says:¹⁵

"There is a class of cases where the bequest is considered not as a power in the nature of a trust, but as a power with a bequest over to the object of it in default of appointment, by *implication*. [The italics are his.] In many instances it is difficult to distinguish the cases.

"Thus in *Mason v. Limbery*, T. Term, 1734, MS. a bequest to A.

¹³ *Carberry v. M'Carthy*, 7 L. R. Ir. 328, 333 (1881). Was it not an undue reliance by Mr. Ames on the expression "power in trust" which is responsible for his assault on *Morice v. Bishop of Durham*, 5 HARV. L. REV. 389?

¹⁴ See p. 317.

¹⁵ See p. 320.

for life whom the testator 'desired at his death to give it amongst his children, and the children of his said daughter, as he should think fit,' was held by Lord Talbot to be a devise to the children in default of appointment, and the children were accordingly decreed to be entitled to the fund, although A. died in the lifetime of the testator, and there are other cases to the same effect."

That is all that Lord St. Leonards says about this class of cases in his first edition, but in the sixth edition, published in 1836, and in the subsequent editions, he enlarges upon the subject and discusses four classes of cases: (1) where the objects of the power do not take; (2) where there is a power in trust within *Brown v. Higgs*; (3) when they take by implied gift; (4) where there is held, on the true construction of the will, to be an express gift to the objects of the power in default of appointment. He says:¹⁶ "This doctrine of gift by implication has not been established without a struggle."

The first case in which I have observed a statement in the reports that objects of a power, upon failure to appoint, take by implication, is *Kennedy v. Kingston*.¹⁷

In *Lambert v. Thwaites*¹⁸ it was held that there was an express gift to the objects of the power, but the doctrine of gift by implication was fully recognized.¹⁹

The best statement of the law is to be found in *Moore v. Ffolliot*:²⁰

"There are several classes of cases . . . First, an estate of inheritance with power of appointment. If the language used in the execution [*qu. creation*] of the power amounts to a precatory trust, the trust will fasten itself on the inheritance; the donee of the power will be bound to execute it, and if he fail to do so the Court will carry it into effect as if he had. This is the case of *Brown v. Higgs* and the like. In *Brown v. Higgs* stress is laid on the circumstance that the testator had given the donee of the power 'an interest extensive enough to enable him to discharge it.'

"There is, however, a distinct class of cases where the donee of the power does not take more than a life estate. In these, however clear the expression of desire on the part of the donor in favor of a particular

¹⁶ 8 ed., p. 591.

¹⁷ 2 Jac. & W. 431, 434 (1821). S. P. *Brown v. Pocock*, 6 Sim. 257 (1833). See *Re White's Trusts*, H. R. V. Johns. 656 (1860); *Stolworthy v. Sancroft*, 33 L. J. Ch. 708 (1864).

¹⁸ L. R. 2 Eq. 151 (1866).

¹⁹ See Farwell, *Powers*, 2 ed., 472, 474; Leake, *Land Law*, 391, 392.

²⁰ 19 L. R. Ir. 499, 501, 502 (1887).

person or class of persons may be, yet, as the donee has no estate, or none beyond his life, the trust to exercise the power is as such personal, and does not directly attach upon the inheritance, save in so far as the Court finds in the language an implication in favor of the objects in default of appointment. In this case, if they take the estate, they take it by implication, and thus by way of limitation under the instrument creating the power. In the former class of cases the Court acts by executing the power in lieu of the donee; in the latter by simply giving effect to the estate implied in the words of the deed or will."

I shall confine myself to the consideration of the second class of cases, the cases where a real power is given, and not where a trust is directly attached to property.

I. When a special power in gross or simply collateral to appoint to a class is given, and there is no gift over in default of appointment, and no appointment is made, the objects of the power take by implication the estate or interest that might have been appointed to them.²¹

In *Marlborough v. Godolphin*²² a life interest in a fund was given to A.; after A.'s death the fund to be divided and distributed to such of the testator's children as A. should by deed or will appoint. It was held that no gift to the children in default of appointment was implied. But this case, although an elaborate opinion of Lord Hardwicke, has been much criticized.²³ It would not now be followed.

In *Crossling v. Crossling*²⁴ land was devised to A. for life, "and she shall dispose of the same amongst my children at her decease as she shall think proper." It was held by the Court of Exchequer that there was no gift over in default of appointment. This case has been doubted, and justly, by Sugden²⁵ and Farwell.²⁶

In *Down v. Worrall*²⁷ a testator directed his trustees to settle such part of the residue at their discretion either for charitable

²¹ Sugden; Powers, 8 ed., 591; Farwell, Powers, 2 ed., 466; 1 Jarman, Wills, 6 ed., 650; Leake, Land Law, 391; 1 Tiffany, Real Property, § 290.

²² 1 Ves. Sr. 61 (1750).

²³ *Brown v. Higgs*, 5 Ves. 495, 505 (1800); *Salisbury v. Denton*, 3 Kay & J. 529, 535 (1857); *Pocock v. Attorney-General*, 3 Ch. D. 342, 348 (1876); *Wilson v. Duguid*, 24 Ch. D. 244, 250 (1881); Sugden, Powers, 8 ed., 592; Farwell, Powers, 2 ed., 464; 1 Jarman, Wills, 6 ed., 651, note.

²⁴ 2 Cox 396 (1794).

²⁵ Powers, 2 ed., 464.

²⁶ Powers, 8 ed., 592.

²⁷ 1 Myl. & K. 561 (1833).

purposes or otherwise for the benefit of the testator's sister and her children. The trustees had all died. Sir John Leach, M. R., held that the power was personal, and that what remained unappointed at the death of the surviving trustee belonged to the testator's next of kin, as undisposed of. The opinion is very short:

"Where a disposition is made in favor of charity and the trustee fails, the Court will interfere and execute the trust; but here no disposition is made in favor of charity as to the unappointed part. The trustees had a personal discretion as to the application of the fund, and, as they have died without exercising that discretion, this part of the property is undisposed of by the testator and belongs to the next of kin."

Down *v.* Worrall is not cited by Lord St. Leonards, and Mr. Farwell²⁸ speaks of it as "a very doubtful case," and in *Salisbury v. Denton*,²⁹ where a donee had a power to appoint to a charity, and the remainder to the testator's relatives as the donee might choose, and the donee made no appointment, the court gave half the fund in charity and the other half to the relatives. No such solution was suggested in Down *v.* Worrall. It is submitted that Down *v.* Worrall is wrong.

In Bull *v.* Vardy³⁰ the point decided was that the objects of a power do not take, in default of appointment, by virtue of an exercise of the power by the court, but the court seem to have thought that under the circumstances of that case they did not take either by way of direct gift or implied gift under the will of the original testator. The case, though cited by Sugden, is not commented on by him, and is not even cited by Farwell.³¹

II. There is no gift implied after a general power. A general power is a power to appoint to all the world, and all the world cannot be made the object of an implied gift.

III. A gift in default of appointment is implied, although the power is an exclusive one, that is, a power to select and not to distribute.³²

²⁸ Powers, 2 ed., 471.

²⁹ 3 Kay & J. 529 (1857).

³⁰ 1 Ves. Jr. 270 (1791), stated p. 3, *ante*.

³¹ See *In re Brierley*, 43 W. R. 36, stated p. 12, *post*.

³² *Witts v. Boddington*, 3 Bro. Ch., Belt's ed., 94 (1790); *Brown v. Higgs*, 4 Ves. 708 (1799), 5 Ves. 495 (1800), 8 Ves. 561 (1803); *Burrough v. Philcox*, 5 Myl. & C. 72 (1840).

IV. If there is an express gift in default of appointment, no gift can be implied.³³

But the fact that there is an express gift in default of appointment upon a contingency which has not in fact occurred does not exclude an implied gift. Thus, where there was a power in A. to appoint to the children of a marriage, and if there were no issue of the marriage, a general power in A. to appoint, and a gift over in default of appointment, and there were children, and the power was not exercised, there was a gift implied to the children.³⁴

V. Although there may be no express gift over, the existence of an implied gift may be negated by the provisions of a will. Thus in *Carberry v. M'Carthy*³⁵ a testator, after declaring in the will that he had already provided for his children, and that he did not "hereby make any further provision for them," gave certain property to his wife upon trust to receive the income during her life, with full power to dispose thereof by deed or will to any of his children. Chatterton, V. C., said that there would have been a gift over by implication to the children in default of appointment, had it not been for the declaration by the testator that he had already provided for the children, but that this declaration showed that the testator intended that the children should not take except by an execution of the power; and that, therefore, the implied gift to them which would have otherwise existed was excluded.

VI. Where there is an express gift in default of appointment, although it is void for remoteness, any implied gift is excluded.³⁶

VII. In *Brown v. Higgs*³⁷ there was a devise to J. in tail, and in default of issue, to one of the sons of S., as J. should, by deed or will, direct. J. and S. both died in the testator's lifetime. S. had four sons. They brought a bill praying that the will might be established. The case was not ripe for decision, and Lord Alvanley,

³³ *Roddy v. Fitzgerald*, 6 H. L. C. 823, 856 (1857); *Pattison v. Pattison*, 19 Beav. 638 (1854); *Goldring v. Inwood*, 3 Giff. 139 (1861); *Richardson v. Harrison*, 16 Q. B. D. 85, 102, 103, 104 (1885), commenting on *In re Jeffery's Trusts*, L. R. 14 Eq. 136 (1872); *In re Lyons and Carroll's Contract*, [1896] 1 I. R. 383.

³⁴ *Fenwick v. Greenwell*, 10 Beav. 412 (1847). And see *Bradley v. Cartwright*, 16 Q. B. D. 511; *Doe v. Goldsmith*, 7 Taunt. 209 (1816). Cf. *Butler v. Gray*, L. R. 5 Ch. 26 (1869).

³⁵ 7 L. R. Ir. 328 (1881).

³⁶ *Re Sprague*, 43 L. T. R. 236 (1880).

³⁷ 4 Ves. 708 (1799).

M. R., made no decision, but he said ³⁸ that he was inclined against the plaintiffs. This inclination seems correct. Only one son was the object of the power, and it was impossible to say to which one a gift could be implied. ³⁹

VIII. Is the gift of the residue a gift over in default of appointment, which excludes any gift by implication?

In *Forbes v. Ball* ⁴⁰ a testator gave his wife 500*l.*, and added: "That it was his will and desire" that she should dispose of it amongst her relations as she by will might think proper. The residue was given to her for life, with gifts over. Sir William Grant, M. R., held that the power had been well exercised, but he said that the will raised a trust for the wife's relations, subject to her appointment.

Healy v. Donnery ⁴¹ was ejectment by the heir of M. for failure to pay rent under a lease for 100 years made by M. to the defendant. The defendant contended that M. had only a life estate, and therefore the lease was determined. The decision of the question turned upon the construction of the will of M.'s father, who died seised of the premises, and devised the premises to M. upon trust to receive the rents during her life, with power to her, by deed or will, to dispose of or devise the premises among her children in such shares as she should see fit. He gave the residue of his estate to M. M. did not execute the power. The court held that M. took the absolute legal estate, and therefore her heir could maintain this ejectment. As M. took the whole legal estate, even if there had been an implied gift, it would have been only of an equitable estate, and M.'s heir was the proper person to bring the ejectment. As the counsel for the defendant said: ⁴² "The only question in the case is whether the children take the legal or only an equitable estate." This case, therefore, does not determine whether, when a life estate is given to A. and a power to him to appoint, a residuary devise to him is a gift in default of appointment so as to exclude an implied gift. ⁴³

³⁸ 4 Ves. 719.

³⁹ See *Sinnott v. Walsh*, 5 L. R. Ir. 27 (1880); Sugden, Powers, 8 ed., 593; 1 Jarman, Wills, 6 ed., 653.

⁴⁰ 3 Meriv. 437 (1817).

⁴¹ 3 Ir. C. L. 213 (1853).

⁴² See p. 215.

⁴³ The statement in *Ahearn v. Aherne*, 9 L. R. Ir. 144, 148 (1881), that in *Healy v. Donnery* it was not held that M. took the absolute legal interest seems unjustifiable, in face of the positive statement in that case of Greene, B., that she did.

But in *Salisbury v. Denton*,⁴⁴ where property was given to the testator's wife for life, with a power to her to appoint, and the wife was made residuary legatee, and the power was not exercised, the court held that there was an implied gift to the objects of the power. It is rather singular that the point of there being a residuary gift to the wife is not mentioned in the opinion.⁴⁵

In *In re Brierley*⁴⁶ a fund was given to trustees in trust to pay the income to the testator's wife for life, with a power to her to appoint the fund to "such of my relatives or next of kin as she may think proper." The wife was made residuary legatee. There was a question whether, on the construction of the will, there was a gift over, in default of appointment, to persons other than the wife, or whether there was a gift of the fund by implication to the testator's next of kin. The court decided that one of these alternatives was correct. They expressly abstained from deciding which, but they held that *upon neither alternative* was the wife as residuary legatee entitled if the power was not exercised. Davey, L. J., said: "A residuary gift is not the same thing as a gift in default of appointment; a residuary gift only gives what would otherwise go to the next of kin." In deciding that a gift of the residue is not a gift over in default of appointment, the court refer to *Forbes v. Ball*⁴⁷ and *Salisbury v. Denton*.⁴⁸

It can therefore be said that a gift of the residue is not such a gift in default of appointment as to exclude a gift by implication.

IX. When there is a power to appoint to a class, and no gift over in default of appointment, and the power is not exercised, there is an implied gift to the members of the class, but it has often been remarked that the language of the will or other instrument creating the power may amount to a direct gift to the members of the class. Thus, if there is a gift to A. for life, with a power to him to appoint to his children, and A. does not exercise the power,

⁴⁴ 3 Kay & J. 529 (1857).

⁴⁵ In the report of the argument of the counsel for the wife's administrator (pp. 531, 532), it is said that the residuary legacy was to the "testator's relatives now represented" by the wife's administrator. This is a slip of the reporter's; the residuary legacy was to the wife, and the counsel's client was her administrator.

⁴⁶ 43 W. R. 36 (Court of Appeal) (1894).

⁴⁷ 3 Meriv. 437 (1817).

⁴⁸ 3 Kay & J. 529 (1857). The case of *In re Brierley* will be referred to later in another connection.

there is a gift by implication to the children; while if there is a gift to A. for life, and on his death to his children in such proportions as A. shall appoint, there is considered to be a direct gift to the children, subject to the power. In the former case, the children take by implication; in the latter, by direct gift.⁴⁹ But there is a recent case which holds that it is only in the latter class of cases that the children can take, that is, that they take only by direct gift, that practically there is never any gift to them by implication.

The proposition is a startling one, and the case must be considered carefully.

It is *In re Weekes' Settlement*.⁵⁰ By a marriage settlement land was settled to uses in favor of the intended wife for life, and on her death, as she should by will appoint, and in default of appointment, to B. By another settlement of even date, personal property was settled in favor of the husband and wife for their lives, and on the death of the survivor, as the survivor should by deed or will appoint, and in default of appointment, to the children of the marriage. The wife died, and by her will gave to the husband a life interest in the land, and also gave him a power to dispose of the land and other property by will amongst the children "in accordance with the power granted to him as regards the other property which I have under my marriage settlements." There were children of the marriage. The husband died without exercising the power. The question was whether B. or the children were entitled to the land. Romer, J., held that B. was entitled.

If the general power given to the wife was not exercised, there was an express gift over in default of appointment to B.; and it may be, perhaps, the law that if a general power is exercised by giving a special power to appoint to a class, the implied gift over to the objects of the special power which would ordinarily be raised is displaced by the express gift in default of appointment under the general power. Whether such displacement would take place seems doubtful, and although Romer, J., refers to the fact that there was an express gift to B., on default of appointment under the general power,⁵¹ he does not rest his decision on this, but discusses the general question whether, upon a special power to appoint to

⁴⁹ Sugden, Powers, 8 ed., 591, 597; Farwell, Powers, 2 ed., 472, 474; Leake, Land Law, 391.

⁵⁰ [1897] 1 Ch. 289.

⁵¹ See p. 293.

a class, there is an implied gift over to the objects of the power; and he decides that there is no such implied gift, but that the objects of the power take in default of appointment only when an express gift to them, or the creation of a trust for them, in default of appointment, can be extracted from the language used by the settlor or testator. He says:

"You must find in the will an indication in fact that the power should be regarded in the nature of a trust — only a power of selection being given, as, for example, a gift to A. for life, with a gift over to such of a class as A. shall appoint."

The only case cited by the learned judge in support of his position is the Irish case of *Healy v. Donnery*.⁵² Romer, J., says that in that case there was a life estate with a power to appoint, but, with submission, that is not so. What the Irish Court of Exchequer held was that the whole legal interest was in the plaintiff, and that, therefore, he could maintain a suit for ejectment against a tenant for years who had failed to pay his rent.

The learned judge then goes on to refer to nine cases in which there was held to be a gift over to the objects of an unexercised power, and he attempts to distinguish them on the ground that in them there was a direct gift to the objects of the power, subject to a power of distribution, and that they took by virtue of the direct gift, and not by implication.

(1) In *Brown v. Higgs*⁵³ the testator "authorized and empowered" J. to receive certain rent and to dispose of it, 100 *l.* annually to himself and to employ the remainder to such children of the testator's nephew S. as J. should think most deserving and would make the best use of it, or to the children of the testator's nephew W. J. did not exercise the power. It was held that the children of S. and W. took. Romer, J., quotes passages from the opinions of Lord Alvanley, M. R., and Lord Eldon, C., but these learned judges speak of the question being whether the power was a simple power or a power in trust, and there is nothing to show whether the trust was to be effected by an implied gift or an express gift. The doctrine that the taking in default of appointment must be either by an express or implied gift was not then clearly apprehended.

⁵² 3 Ir. C. L. 213 (1853). The case is stated p. 11, *ante*.

⁵³ 4 Ves. 708 (1799), 5 Ves. 495 (1800), 8 Ves. 561 (1801).

(2) In *Burrough v. Philcox*⁵⁴ a will directed that on certain contingencies the testator's property should "be disposed of as shall be herein after mentioned, (that is to say)" A. should have power by will to dispose of the property to one or more of the testator's nephews and nieces and their children as A. should think proper. The power was not exercised. Lord Cottenham, C., held that the nephews and nieces and their children took in default of appointment. He said:

"When there appears a general intention in favour of a class and a particular intention in favour of individuals of a class to be selected by another person, and the particular intention fails from that selection not being made, the court will carry into effect the general intention in favour of the class."

But whether the intention is carried into effect by considering that there is an implied gift or that there is an express gift, the Chancellor does not say.

(3) In *Witts v. Boddington*⁵⁵ a testator gave to his wife during her life the enjoyment of his watches, rings, jewels and plate and all his diamonds, etc., with an exclusive power for her, by deed or will, to give the same to the children of M., who was his only daughter, but if no such children were alive at his wife's death, then he desired her to give or leave the same to some one or more of his own relations. The wife did not exercise the power as to some of the articles. It was held that the children of the daughter took. Romer, J., disposes of this case by saying that the will was "very peculiar."

(4) In *Forbes v. Ball*⁵⁶ a will said: "I give to A. C. 500*l.*, and it is my will and desire that A. C. may dispose of the same among her relations, as she by her will may think proper." Sir William Grant, M. R., said that there was a gift to the wife's relations. Romer, J.'s comment on this case is that such gift over was by force of the words "my will and desire."

(5) In *Birch v. Wade*⁵⁷ the same words "will and desire" were used, and Romer, J., again says that it was by force of these words that there was a gift in default of appointment. But as to this a remark of Kenyon, M. R., in *Pierson v. Garnet*⁵⁸ is very weighty. He says:⁵⁹

⁵⁴ 5 Myl. & C. 72 (1840).

⁵⁶ 3 Meriv. 437 (1817).

⁵⁸ 2 Bro. Ch. 38, 45 (1786).

⁵⁵ 3 Bro. Ch., Belt's ed., 95 (1790).

⁵⁷ 3 Ves. & B. 198 (1814).

⁵⁹ At p. 45.

"It would be a lamentable case, if this court were to raise a distinction upon slight words, such as *peto, rogo, fidei tuæ commendo*, and such expressions of the civil law; and if the decisions were to turn upon such grounds, property would be very vague."

(6) In *In re Caplin's Will*⁶⁰ a testator, after giving his wife a life interest in a trust estate, directed that on her death a part of the estate should be paid to such of the relations and friends of the wife as she should by will appoint. It was held by Kindersley, V. C., that if no appointment was made, there was a gift over to the objects of the power. Romer, J., sustains this case on the same ground upon which he puts the other cases, that it was "a gift to a class or such of a class as might be selected by the donee." He admits that there was "a general statement" in *In re Caplin's Will* which "went beyond the case." The "general statement" is this:

"There being then a life estate in [the wife] with a power to appoint by will to her relations, and no gift over in default of appointment, I must hold that there is an implied trust in favour of the objects of the power."

(7) In *Re White's Trusts*⁶¹ a testator gave property to trustees in trust for his son R. for life, and then to R.'s children, and then proceeded thus: "Should my said son die childless, I confide in the said trustees for applying" the trust property "to the benefit of such other of my children as they may think fit, for the interest and good of my family." R., the son, died childless, and the trustees died without executing the power. Page Wood, V. C., said: "It is settled by *Brown v. Higgs* and *Burrough v. Philcox* that where there is a power to appoint among certain objects and no gift in default of appointment, the court will imply a gift to the objects of the power equally"; and he accordingly held that the power not having been exercised, the other children took by the implied gift. Romer, J., here again says: "Unless checked by reference to the case before him, that statement was too large."

(8) In *Butler v. Gray*⁶² there was, as Romer, J., says, a sufficient indication that the class were to take.

(9) Of *In re Brierley*,⁶³ a decision of the Court of Appeal, Romer, J., says: "It was a decision not in point on the proposition con-

⁶⁰ 2 Dr. & Sm. 527 (1865).

⁶¹ L. R. 5 Ch. 26 (1869).

⁶² H. R. V. Johns. 656 (1860).

⁶³ 43 W. R. 36 (1894).

tended for." But, with submission, it was very much in point, and is dead against the proposition contended for by the learned judge in *In re Weekes' Settlement*. In *In re Brierley* a testator gave his wife the income for life of a fund held in trust, and directed that if he died childless (which happened) the wife might "bequeath or appoint" the fund "to such of my brothers and sisters and nephews and nieces and other of my relatives or next of kin as she shall think proper." It is surely impossible to distinguish the power in this case from that in *In re Weekes' Settlement*. The testator went on to direct that the remainder of his property should be divided into forty-three parts. He disposed of some of these parts, and made his wife residuary legatee. The wife brought a suit in equity calling on the trustees to hand over the fund to her on her executing a release.

There were three possible views: *first*, that there was an implied gift of the fund to the objects of the power; *second*, that the fund passed under the gift of the remainder of the property; *third*, that it passed to the wife as residuary devisee. The Court of Appeal, Lord Herschell, C., Lindley and Davey, L.JJ. (certainly a very strong court), expressly declined to consider whether the second or third view was correct, and they declined *because* the first view was correct. The Lord Chancellor speaks rather contemptuously of the attempt to found any argument on the presence or absence of the words "it is my will" or "desire."

"The truth is that there is no magic about the use of the words 'it is my will and desire.' Everything that is found in the testator's will indicating what is his intention is as much indicating his will and desire as if he had in so many words used that language."

Davey, L. J., in the course of the argument said:

"Would it not be a correct statement of the law to say that if there be a power to appoint among certain objects, but no gift to those objects and no gift in default of appointment, then the law will imply a gift to those objects in default of appointment?"

In *Carberry v. M'Carthy*⁶⁴ there was a devise to A. upon trust to receive the rents during her life, with full power to dispose thereof by deed or will to all or any of the testator's children. Chatterton, V. C., passing upon the provision, said:

⁶⁴ 7 L. R. Ir. 328 (1881).

"If the question depended solely on the effect of the portion of the will which I have mentioned, I should hold that the power was coupled with a trust, and that the testator's children, being the objects of the power, were intended to take in default of the execution of the power, and were not to be deprived of the benefits intended for them by the failure of the donee to appoint in pursuance of it. They would in such case take the property in equal shares by implication."

The Vice-Chancellor, however, thought that other language in the will excluded the implication.⁶⁵

In *In re Hall*⁶⁶ the sum of 500*l.* was by will given in trust, to pay the income to R. for life or until she married, when the testatrix directed the sum to be settled, and she declared that it was her will and desire that if R. died unmarried, she should have power to demise (*sic*) the legacy to such of her brothers or sisters or their children as she should think proper. R. died without effectually exercising the power. Porter, M. R., held that there was no implied gift to the objects of the power. The decision in this case goes further than in *In re Weekes' Settlement*, for in this case the words "will and desire" are used, the presence of which Romer, J., seems to have thought sufficient to give a gift over. The opinion in *In re Hall* gives many extracts from earlier cases, but it seems to contain nothing that calls for remark. It is submitted that it is wrong.

In view of the above, and especially of the direct decision of the Court of Appeal in *In re Brierley*, it is submitted that the conclusion reached in *In re Weekes' Settlement* and in *In re Hall* cannot be sustained, but that, on the contrary, in accordance with the frequent statements of judges and the unanimous opinions of the text writers, gifts in default of appointment to the objects of a power can be raised by implication.

The American cases lend no countenance to the novel doctrine of *In re Weekes' Settlement*.

In *Dominick v. Sayre*⁶⁷ there was a devise to M. for life "with power to give the same to descendants." It was held that a gift in default of appointment was implied. The court consider and reject any distinction between a power to A. to appoint to a class and a gift to such members of a class as A. may select.⁶⁸

⁶⁵ See the case stated p. 10, *ante*.

⁶⁷ 3 Sandf. (N. Y.) 555 (1850).

⁶⁶ [1899] 1 I. R. 308.

⁶⁸ See *Smith v. Floyd*, 140 N. Y. 337 (1893).

In *McGaughey's Admr. v. Henry*⁶⁹ a tenant for life had a power to divide property as she might think right among her children. A gift to the children was implied.

In *Milhollen's Admr. v. Rice*⁷⁰ a testator directed that property in which A. had a life interest should be "at her disposal to whom she thinks proper of her heirs." It was held that there was a gift by implication to A.'s heirs.

In *Rogers v. Rogers*⁷¹ A. who had a life interest, was given "the privilege" of giving the property to whom she pleased among his children or grandchildren. It was held that there was an implied gift to the objects of the power.

In *Morris v. Owen*⁷² slaves were bequeathed to S. for life, "and then to be divided at her discretion, amongst my children." The Court of Appeals of Virginia in a *per curiam* opinion, besides disposing of other points, said that the slaves as to whom there was not any appointment "remained as part of the residuary estate." There does not seem to have been any discussion on the point. On the words of this will, it is clear that even Romer, J., and Porter, M. R., would have held there was a gift to the objects of the power. The case would seem to be of little, if any, authority.

*Frazier v. Frazier's Executors*⁷³ is obscurely reported. The point in question here does not seem to have been considered.

In *Holt v. Hogan*⁷⁴ property was given to the testator's wife for life, with the privilege of disposing of the same by will or otherwise amongst "our children" at her death. Whether there was any gift over by implication was a matter not considered; it seems to have been taken for granted that there was not. The question discussed was whether the property fell into the residue or whether there was an intestacy with regard to it.

X. To what objects of a power is a gift implied?

The cases fall under three heads:

(A) Power to appoint to one or more defined classes of relations, such as children, grandchildren, issue, descendants, nephews, etc.

(B) Power to appoint to "family" or to "relations."

(C) Power to appoint to charities.

(A) Under a power to appoint to the members of one or more

⁶⁹ 15 B. Mon. (Ky.) 383 (1854).

⁷⁰ 2 Head (Tenn.) 660 (1859).

⁷³ 2 Leigh (Va.) 642 (1831).

⁷¹ 13 W. Va. 510, 543-565 (1878).

⁷² 2 Call (Va.) 520 (1801).

⁷⁴ 5 Jones Eq. (N. C.) 82 (1859).

classes, *e. g.*, a power to appoint to children or grandchildren, or a power to appoint to descendants, all the persons to whom an appointment could have been made take *per capita* as tenants in common.⁷⁵

In *Jones v. Torin*,⁷⁶ where the power was to appoint to children or their descendants, "descendants" was held to be substitutionary, and in *Tucker v. Billing*,⁷⁷ where the power was to appoint to brothers and sisters and their descendants, the same was held. Both of these decisions are questioned by Mr. Jarman.⁷⁸ But in *Rogers v. Rogers*,⁷⁹ where there was a power to appoint to children or grandchildren, it was held that the children of living children could not share an implied gift. These cases seem very doubtful.

In *Martin v. Swannell*⁸⁰ a testator gave his estate to his wife for life, and on her death he devised it to his three children and their issue, as the wife should appoint. The power was not exercised. Lord Langdale, M. R., held that the children took estates tail.

When there is a bequest to children as A. shall appoint, and there is no appointment and only one child, the child takes the whole.⁸¹

In *Eddowes v. Eddowes*⁸² a share of the residue was given to trustees, upon trust, at their discretion, to apply the whole or part of the capital or income for the benefit of the testator's son J., or, at the option of the trustees, to augment the other shares. J. died, and the trustees refused to exercise the option. Kindersley, V. C., held that the share was undisposed of. He said four implied gifts had been suggested: (1) To the other children of the testator (to whom the other shares of the residue were given) excluding J.;

⁷⁵ *Brown v. Higgs*, 4 Ves. 708 (1799), 5 Ves. 495 (1800), 8 Ves. 561 (1803); *Longmore v. Broom*, 7 Ves. 125 (1802); *Brown v. Pocock*, 6 Sim. 257 (1833); *Grieverson v. Kirsopp*, 2 Keen 653 (1838); *Burrough v. Philcox*, 5 Myl. & C. 72 (1840); *Penny v. Turner*, 15 Sim. 368 (1846), 2 Phil. 493; *Re White's Trusts*, H. R. V. Johns. 656 (1860); *Stolworthy v. Sanicroft*, 33 L. J. Ch. 708 (1864); *Dominick v. Sayre*, 3 Sandf. (N. Y.) 555 (1850). Cf. *Tomlinson v. Nickell*, 24 W. Va. 148 (1884).

⁷⁶ 6 Sim. 255 (1833).

⁷⁷ 2 Jur. N. S. 483 (1856).

⁷⁸ 1 Jarman, Wills, 3 ed., 482, n. 1, 483, n. 1. Cf., however, *Crozier v. Crozier*, 3 Dr. & War. 373, 386 (1843).

⁷⁹ 2 Head (Tenn.) 660 (1859).

⁸⁰ 2 Beav. 249 (1840).

⁸¹ *Bellasis v. Uthwatt*, 1 Atk. 426 (1737); *Davy v. Hooper*, 2 Vern. 665 (1710); *Madoc v. Jackson*, 2 Bro. Ch. 588 (1789).

⁸² 7 Jur. N. S. 354 (1861).

(2) to J., excluding the other children; (3) to all the children, including J., equally; (4) half to J. and half to the other children; and he concluded that there was not enough in the will to enable him to determine the persons to whom the testator wished the share to go.

If a power given to a life tenant is exercisable by either deed or will, all those of the class to whom an appointment might have been made are included in the implied gift in default of appointment, and therefore if one of them dies in the lifetime of the donee, his heirs or representatives share in the gift.⁸³

In *Winn v. Fenwick*⁸⁴ property was settled in trust for A. for life, and after his death, if B., A.'s wife, died in A.'s lifetime leaving any child living at her death, then on trust for all the children of A. and B., in such shares as B. should by deed or will appoint. B. died in A.'s lifetime leaving children and not having executed the power. It was held that the implied gift was only to those children who survived B.

In *Stolworthy v. Sancroft*⁸⁵ property was given to trustees upon trust to pay the income to A. for life, and, after her death, if she left issue, to dispose of the property in such manner amongst such issue as A. should by deed or will appoint. A. did not exercise the power. Kindersley, V. C., held that there was a gift implied to the issue of A. living at her death.

Where there is no life estate, and the power is given to executors or trustees, the gift implied in default of appointment is to those objects of the power who are living at the time of the creation of the power.⁸⁶

If the power is exercisable by will only, then as the only objects of the power are persons living at the death of the donee, the gift implied in default of appointment is confined to such persons.⁸⁷

⁸³ *Madoc v. Jackson*, 2 Bro. Ch. 588 (1789) (disapproving *Maddison v. Andrew*, 1 Ves. Sr. 58, 60, which is *contra*); *Casterton v. Sutherland*, 9 Ves. 445 (1804); *Faulkner v. Wynford*, 15 L. J. N. S. 8 (1845); *In re Jackson's Will*, 13 Ch. D. 189 (1879); *Wilson v. Duguid*, 24 Ch. D. 244 (1883). *Contra*, wrongly, *Rogers v. Rogers*, 2 Head (Tenn.) 660 (1859). *Cf.* *Reade v. Reade*, 5 Ves. 744, 748 (1800).

⁸⁴ 11 Beav. 438 (1849).

⁸⁵ 33 L. J. Ch. 708 (1864).

⁸⁶ *Longmore v. Broom*, 7 Ves. 125 (1802); *Cole v. Wade*, 16 Ves. 27 (1807); *Walter v. Maunde*, 19 Ves. 424 (1810). See Sugden, Powers, 8 ed., 601, 622; Farwell, Powers, 2 ed., 476.

⁸⁷ *Kennedy v. Kingston*, 2 Jac. & W. 431 (1821); *Walsh v. Wallinger*, 2 Russ. & M.

There is one, and only one, case which holds that where a power given to a life tenant is testamentary, the representatives of an object of the power who died in the lifetime of the donee can take. This is a decision of Vice-Chancellor Kindersley in *Lambert v. Thwaites*.⁸⁸ The case is referred to as law in the modern text books.⁸⁹

The decision in *Lambert v. Thwaites* is rested on a distinction between a power with an implied gift in default of appointment (*e. g.*, a devise to A. for life, with a testamentary power to A. to appoint to his children), and a direct gift to a class, coupled with a power of distribution or selection (*e. g.*, a devise to A. for life and on his death to his children as he may by will appoint). The distinction is a fine one, and it is obvious that the cases may so run into one another as to make it difficult of application.⁹⁰

But, assuming the distinction to be sound, it seems to be of no practical importance except on two points: *First*. It may be said that there is never an implied gift to a class in default of appointment, and that when the members of the class take in default of appointment, they take because there is a direct gift to them. This is what was held in *In re Weekes' Settlement*.⁹¹ I have discussed this case above,⁹² and have endeavored to show that the case is contrary to authority and is wrong. *Second*. It may be said that if a testamentary power is given to a life tenant to appoint to a class, only those members of the class who survive the life tenant can take, but that if there is a gift to a class after the death of the life tenant, in such shares as the life tenant may appoint, there is a direct gift to the class, and that in default of appointment the representatives of those members of the class who have died before the life tenant come in for their share. This was the ground of decision in *Lambert v. Thwaites*.

In that case, by a post-nuptial settlement, land was given to

78 (1830); *Brown v. Pocock*, 6 Sim. 257 (1833); *Woodcock v. Renneck*, 4 Beav. 190 (1841), 1 Phil. 72; *Freeland v. Pearson*, L. R. 3 Eq. 658 (1867); *Tucker v. Billing*, 2 Jur. N. S. 483 (1856); *In re Susanni's Trusts*, 20 W. R. 93 (1877); *Sinnott v. Walsh*, 5 L. R. Ir. 27 (1879). See *Moore v. Ffoliot*, 19 L. R. Ir. 499 (1887).

⁸⁸ L. R. 2 Eq. 151 (1866).

⁸⁹ Farwell, Powers, 2 ed., 472; Leake, Land Law, 391, 392; 1 Jarman, Wills, 6 ed., 651; 2 Jarman, Wills, 6 ed. 1705.

⁹⁰ Cf. the remark of Kenyon, M. R., in *Pierson v. Garnet*, 2 Bro. Ch. 38, 45, cited p. 16, *ante*.

⁹¹ [1897] 1 Ch. 289.

⁹² See pp. 13 *et seq.*

trustees in trust to pay the rents to W. and his wife during their lives, and, on the death of the survivor, to sell and divide the proceeds amongst all the children of W. in such shares and proportion as he should by will appoint. One of the children died in W.'s lifetime. W. died without exercising the power. It was decided that the representatives of the deceased child were entitled to share. The court held that there was not an estate by implication to the children in default of appointment, but an express vested gift to the children, subject to be divested by the exercise of the power.

But assuming that there was here a direct gift to a class, it still remains a question what is the class to whom the direct gift is made. The learned Vice-Chancellor refers to the doctrine, which is now perfectly well settled, notwithstanding some former doubts, that a gift which would otherwise be vested is not made contingent by being preceded by a power, but it by no means follows that a gift otherwise contingent is made vested by being preceded by a power. Suppose a power is given, with an express gift, in default of appointment, to those members of a class who survive the donee of the power. Here the gift is certainly contingent, and the representatives of a deceased member of the class would not share. Now was not this the case in *Lambert v. Thwaites*?

In *Woodcock v. Renneck*⁹³ a testator gave a fund to trustees in trust to pay the income to J. and his wife during their lives and the life of the survivor, and after their decease, in trust to pay the fund to their children in such shares and proportions as the survivor of J. and his wife should by will appoint. Lord Langdale, M. R., decided that only the children who survived J. and his wife could share. This case is in flat contradiction with *Lambert v. Thwaites*. Vice-Chancellor Kindersley sought to avoid its effect by declaring that what the Master of the Rolls said was only a *dictum*. "very unnecessarily" pronounced. But this, it is submitted, is not correct. What Lord Langdale said was not a *dictum*, but a decision on a point at issue.

Only one of the children survived the parents, and the surviving parent made an appointment to this child. The administrator of a child who had died in the lifetime of the parents brought a bill in equity praying for a declaration that he was entitled to share in the fund, and for a decree that the trustees might be directed to

⁹³ 4 Beav. 190 (1841).

transfer the same to him. He contended that the appointment by the surviving parent was not valid.

Lord Langdale, M. R., did not decide whether the appointment was valid, and he expressed no opinion upon the point, because, even if the appointment was invalid, only the surviving child could take, and the plaintiff, whose claim was as representing a deceased child, could take no share. He therefore dismissed the bill.

Lord Langdale said:

"I think that there is a gift to children of Mr. and Mrs. Christie, subject to a power to be exercised by the surviving parent. But in considering what children of Mr. and Mrs. Christie were objects of the gift, it is necessary to consider the whole sentence in which the gift is expressed, and that sentence comprises the words creating the power; and although a portion of the sentence, if taken by itself, imports a gift to all the children, the generality of the expression may be limited by the other words of the same sentence; and as the power was to be exercised only by the will of the surviving parent, and therefore could only be exercised in favour of those who were living at the death of the surviving parent: — as this is not, in express terms, a gift to all the children in default of appointment, but a gift or trust for children, with words annexed, shewing that the distribution was to be among the children living at the death of the surviving parent: — and, moreover, as the gift is expressed only in the form of a direction to trustees to transfer and pay to children, after the death of the surviving parent; I think that the objects of the power and the objects of the gift are the children living at the death of the surviving parent, and, consequently, that the Plaintiff has no interest in the fund.

"The Plaintiff contended that the words expressing the power ought to have no effect in determining the objects of the gift, but ought to have effect in shewing an intention to sever the shares of the children so as to prevent a joint tenancy, but the words cannot be thus alternately rejected and employed."

The case was brought by appeal before Lord Cottenham, C.⁹⁴ The Lord Chancellor appears to have thought that the appointment was valid. He affirmed the judgment of the Master of the Rolls and said:

"It was contended on the part of the Plaintiff that this was a vested interest in all the children living at the death of the testator William

⁹⁴ 1 Phil. 72 (1841).

Linton. For it was said that the words of the bequest in favour of the children were, in substance, the same as those which were made use of in the bequest to Joseph Christie and Sarah his wife, who, it was admitted, took a vested life interest under the will. But to support this argument a part only of the words are taken, omitting the subsequent portion of the clause, upon the true construction of the whole of which the question must depend."

It is submitted that the decision of Lord Langdale, M. R., approved by Cottenham, C., is good sense and good law, and should be followed rather than the decision of Vice-Chancellor Kindersley in *Lambert v. Thwaites*. It is certainly difficult, in construing such a provision, to attribute to a testator an intention that those children should take in default of appointment to whom no appointment could be made.

But, further, the doctrine of *Lambert v. Thwaites*, that upon a gift to A. for life, and, on his death, to his children as he shall by will appoint, the children who have died in the lifetime of A. are entitled to share, — that is, that persons can take to whom no appointment could be made, is inconsistent with what has been decided in two cases in which the life tenant and the donee were different persons. There would seem to be no difference whether the power is in gross or is simply collateral.

(1) In *Halfhead v. Sheppard*⁹⁵ a testator devised land to his wife C. for life, and directed that, if R. survived C., he should, immediately on her death, divide the land in such manner amongst all the testator's children as they should severally reach twenty-one as R. should think equitable and fair. The testator had three children; two only reached twenty-one, and all died in the lifetime of C. R. survived C., but did not execute the power. It was held that the children did not take.

(2) In *In re Phene's Trusts*⁹⁶ a testator gave a fund to his executors in trust for M. for life, and from and immediately after her death, in trust for the benefit of M.'s children, as the executors might think most to their advantage. Some of M.'s children and also the executors died in M.'s lifetime. It was held that only the children who survived M. were entitled.⁹⁷

⁹⁵ 1 E. & E. 918 (1859).

⁹⁶ L. R. 5 Eq. 346 (1868).

⁹⁷ Cf. *Wilson v. Duguid*, 24 Ch. D. 244, 251 (1883); 2 Jarman, Wills, 6 ed., 1706.

In *Carthew v. Enraght*⁹⁸ a testator directed that after the death of his wife, his trustees should divide and pay a fund equally between such ten of the children or remoter issue of H. as the trustees should see fit. At the death of the widow, there were only six descendants of H. living. It was held that they were entitled to the whole fund.

(B) Power to appoint to "family" or "relations."

The word "family" has no technical meaning.⁹⁹ When a will gives a power to appoint to a "family" or to the members of a "family," the question whether the person or persons to whom a gift is implied in default of appointment are the heirs, the next of kin, or the children, depends upon the words of the will taken in connection with the state of the family.¹⁰⁰ "The cases on 'relations' are very peculiar."¹⁰¹

Under a non-exclusive power to appoint to "relations,"¹⁰² none

⁹⁸ 20 W. R. 743 (1872).

⁹⁹ 2 Jarman, Wills, 6 ed., 1582 *et seq.*

¹⁰⁰ See *Cruwys v. Colman*, 9 Ves. 319 (1804); *Wright v. Atkyns*, 17 Ves. 255 (1810), 1 Ves. & B. 313 (1813), 19 Ves. 299 (1814), more fully reported in *G. Coop.* 111 (1815), 1 Turn. & R. 143 (1833), (the best statement of the case is in Sugden, *Law of Property in House of Lords*, 376); *Sinnott v. Walsh*, 5 L. R. Ir. 27 (1879).

¹⁰¹ *Per* Chitty, J., in *Wilson v. Duguid*, 24 Ch. D. 244, 249 (1883).

¹⁰² When the doctrine of non-exclusive powers, namely that under a power to appoint to children a share must be given to each child, had become settled, it soon became obvious that by giving a shilling to a child, the application of the doctrine might be utterly evaded, and therefore the Court of Equity laid down the rule that the share given to any child must not be illusory. The establishment of this rule as to illusory appointments was the necessary corollary of non-exclusive powers. Without it, non-exclusive powers are a laughing-stock and a legal farce.

But the rule as to illusory appointments is unique in the law. Other rules of doubtful character have found defenders or apologists, but no one has had a good word for this. It has been condemned in the most unmeasured terms by judge after judge; by Sir Richard Pepper Arden (afterwards Lord Alvanley), M. R., in *Spencer v. Spencer*, 5 Ves. 362 (1800); *Kemp v. Kemp*, *id.* 849 (1801); by Sir William Grant, M. R., in *Butcher v. Butcher*, 9 Ves. 382 (1804); and by Lord Eldon, C., in *Bax v. Whitbread*, 16 Ves. 15 (1809), and *Butcher v. Butcher*, 1 Ves. & B. 79, 94, 96 (1812).

This state of things was so intolerably inconvenient and mischievous that a statute was passed abolishing the rule as to illusory appointments. The statute did not touch the doctrine of exclusive appointments, but the absurdity of this, after having been pointed out by Sir George Jessel, M. R., in *Gainsford v. Dunn*, L. R. 17 Eq. 405 (1874), was recognized by the legislature, and in 1874 another statute was passed by which every power is made exclusive.

There is very little law in the United States on non-exclusive powers and illusory appointments, but it is submitted that the proper mode of dealing with them is that adopted by the Judicial Committee of the Privy Council in the case of *McGibbon v. Abbott*, 10 A. C. 653 (1885). A resident in Lower Canada, under a power which would

of the statutory next of kin can be excluded from the appointment, and no one who is not of the statutory next of kin can be included.¹⁰³ And though, under an exclusive power, an appointment may be made to a relation who is not one of the next of kin,¹⁰⁴ yet even when the power to appoint to relations is exclusive, the gift over in default of appointment is to the statutory next of kin.¹⁰⁵

But here a question of some difficulty arises.

At what time are the statutory next of kin to be determined?

First. Suppose the donee of the power is also the life tenant. Here the next of kin are to be determined as of the date of the life tenant's death. This is so not only when the power is exclusive, as in *Harding v. Glyn*,¹⁰⁶ but also when it is non-exclusive,¹⁰⁷ and also whether it is exercisable by either deed or will.¹⁰⁸

have been held non-exclusive under the English precedents, appointed to some only of the objects. The appointment was held valid. The Court said:

"The Courts in Lower Canada are not bound by the current of decisions in England, as the Judges in England before 1874, and Lord Alvanley in the case of *Kemp v. Kemp*, considered themselves to be bound, in deciding whether a power was exclusive or non-exclusive."

And again:

"It would be lamentable if their Lordships, in a case arising in Lower Canada and to be determined by the law of that country, should feel themselves bound by a course of English decisions which have been swept away by the legislature as fraught with inconvenience and mischief, and thus to be driven to such a construction of the will of William as would form a precedent in future cases of a similar nature, and thereby introduce into Lower Canada all those difficulties and inconveniences which it required the force of an Act of Parliament in England to remove."

¹⁰³ *Pope v. Whitcomb*, 3 Meriv. 689 (1810); *In re Deakin*, [1894] 3 Ch. 565; *Lawlor v. Henderson, Jr.* R. 10 Eq. 150 (1876); *In re Patterson*, [1898] 1 I. R. 324; *Varrell v. Wendell*, 20 N. H. 431 (1846); Sugden, Powers, 8 ed., 657; Farwell, Powers, 2 ed., 504; 1 Jarman, Wills, 6 ed., 823.

¹⁰⁴ *Harding v. Glyn*, 1 Atk. 469 (1739), see 5 Ves. 501 (1800); *Grant v. Lynam*, 4 Russ. 292 (1828); Sugden, Powers, 8 ed., 658; Farwell, Powers, 2 ed., 504; 1 Jarman, Wills, 6 ed., 823.

¹⁰⁵ *Doyley v. Attorney-General*, 4 Vin. Abr. 485, *pl.* 16 (1735); *Cole v. Wade*, 16 Ves. 27 (1806); *Salisbury v. Denton*, 3 Kay & J. 529 (1857); *Mahon v. Savage*, 1 Sch. & Lef. 111 (1803); Sugden, Powers, 8 ed., 659; Farwell, Powers, 2 ed., 506; 2 Jarman, Wills, 6 ed., 1633. See *Spring v. Byles*, 1 T. R. 435-438 n. (1783); *Varrell v. Wendell*, 20 N. H. 431 (1846).

¹⁰⁶ 1 Atk. 469 (1739).

¹⁰⁷ *Pope v. Whitcomb*, 3 Meriv. 689 (1810), correctly stated in Sugden, Powers, 8 ed., 662, 663.

¹⁰⁸ *Harding v. Glyn*, *Pope v. Whitcomb*. See *Cruwys v. Colman*, 9 Ves. 319, 325 (1804); *Birch v. Wade*, 3 Ves. & B. 198 (1814); *Finch v. Hollingsworth*, 21 Beav. 112 (1855); Sugden, Powers, 8 ed., 661-663; Farwell, Powers, 2 ed., 508; 1 Jarman, Wills,

Second. Suppose the donee of the power is not the life tenant.

In *Doyley v. Attorney-General*¹⁰⁹ a testator gave his whole estate to trustees in trust to pay the income to his niece Elizabeth during her life, and on her death he directed the trustees to dispose of his real and personal estate to such of his relations on his mother's side as were most deserving, and in such manner as they saw fit, and for such charitable uses and purposes as they should also think most proper and convenient. The power was not exercised. Jekyll, M. R., said "that as to the personal estate, there should be no representation of those relations who died in the lifetime of Elizabeth; for before her death no part thereof vested in any of the relations, and it was contingent whether they would be entitled thereto or not."

It would rather appear as if Lord St. Leonards thought that the law would be the same in this case as in that where the life tenant was the donee, but it is not clear from his book on Powers,¹¹⁰ and in the last edition of Jarman on Wills¹¹¹ it is said that "whether this principle [that only relations living at the death of the tenant for life can take] applies except where the donee of the power is also tenant for life is not clear."¹¹²

Where the power is to appoint to a defined class of relations, the implied gift is to that class, as on a power to appoint to relations on the mother's side. Where the gift is to "poor relations," whether the gift is direct or whether it is one which arises by implication in default of appointment, — and there would seem to be no difference between the two cases, — the better opinion appears to be that the word "poor" is not to be rejected, but that the gift is to be confined to those who are poor.¹¹³

(C) Power to appoint to charities.

Where there is a power to appoint to charities, and no gift over in default of appointment, there is an implied gift to charity which the court will administer in the same way in which it will administer direct gifts to charity.

6 ed., 653. But *cf.* *Wilson v. Duguid*, 24 Ch. D. 244, 251 (1883); 1 Chance, Powers, 78.

¹⁰⁹ 4 Vin. Abr. 485, pl. 16 (1735).

¹¹⁰ Sugden, 8 ed., 661.

¹¹¹ 1 Jarman, Wills, 6 ed., 653.

¹¹² See also *Wilson v. Duguid*, 24 Ch. D. 244, 251 (1883).

¹¹³ The cases are collected in Gray, Rule against Perpetuities, 2 ed., § 683, n. See also Farwell, Powers, 2 ed., 508; 2 Jarman, Wills, 6 ed., 1634.

In *Doyley v. Attorney-General*,¹¹⁴ by a devise, the words of which are quoted above, there was a power to appoint to relations and to charitable uses. The power was not exercised. The property was decreed half to the relations and half to charity.

In *Salisbury v. Denton*¹¹⁵ a testator directed that a fund, in which his wife had a life interest, should be at her disposal by will to apply a part for such charitable endowment for the poor of Ottley as she might prefer, and the remainder to be at her disposal among the testator's relatives as she might direct. He made his wife sole residuary legatee. The wife did not exercise the power. *Wood, V. C.*, held that half of the fund went in charity and the other half to the testator's child, who was his sole next of kin.

XI. Conflict of Laws.

In *Little v. Neil*¹¹⁶ a marriage contract, said to have been entered into in the Scotch form, provided that the trustees "shall from time to time, as they in the exercise of their discretion shall see cause, apply and expend the whole income and capital of the said trust estate, or such part or parts thereof as they shall think proper to and for the use or benefit of such one or more of the wife and children of J. H. Parks and the issue of such children" as they shall select. But it was declared that any provision for the wife of Parks should be by an annuity dependent on the life of Parks. The trustees declined to exercise the power. The report states that a question was raised as to the disposition of the property. *Kindersley, V. C.*, delivered the following opinion:

"If it had been necessary to construe this settlement, the Court must have satisfied itself as to the law of Scotland, the country in which it was made; but the present question is not one of the construction of the settlement, but how the fund shall be dealt with in the circumstances which have happened and that must be decided according to the practice of this court. The case of *Longmore v. Broom* is in point upon this question, and by that it was decided that upon the death of the trustees who had power to exercise a discretion, the fund must be divided equally between the objects of the power. Here the objects of the power are the wife and children of Mr. Parks. The only difficulty I feel is whether, in giving Mrs. Parks a share in the fund, I ought not to give effect to the direction to the trustees that whatever she takes

¹¹⁴ 4 Vin. Abr. 485, *pl.* 16 (1735).

¹¹⁵ 3 Kay & J. 529 (1857).

¹¹⁶ 31 L. J. Ch. 627 (1862).

is to be an annuity depending on the life of J. H. Parks; but under the present circumstances, the Court is not exercising the discretion of the trustees nor construing the settlement, and therefore I cannot do otherwise than direct the fund to be divided equally between the wife and children."

It seems here that the question was whether, by the settlement, there was an implied gift to the wife and children, and that this was a question of construction. Even if it were held that there was not an implied gift of an equitable interest, but that this was a case of an imperative trust, the question of whether such trust was raised was a question of construction, and therefore the decision that the Scotch law was not applicable seems on this point questionable.

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THE STANDARD OIL AND TOBACCO
CASES.

IN an article called "The Federal Anti-Trust Act," published in the HARVARD LAW REVIEW in March, 1910,¹ the writer of the present article, after reviewing every decision on the Act rendered by the Supreme Court up to that time, stated as a conclusion that business and law had "got into what it is little exaggeration to call an *impasse*."

As a general summary of the rules of law to be drawn from these decisions the following was ventured:

"Any combination which directly restrains interstate trade is illegal. Trade is restrained by the ending or limiting of competition among the members of the combination as well as when the business of others is injured; it is not necessary that competition of outsiders be destroyed or affected. The restraint need not be unreasonable. The actual effect of the transaction on prices is not a determining factor; it is sufficient if a power to raise prices is acquired or increased. This power need not be broad enough to cover the whole country; indeed, its possible exercise may embrace only comparatively narrow limits. A 'direct' restraint imports not only that the restraint be the proximate result of the combination, but also in some degree substantial. Whether the court will hold any given restraint trifling and negligible or substantial and 'direct,' there is no rule to determine. A holding company is a combination."²

The supremely important propositions of the above summary are that the ending of competition merely among the members of a combination is illegal; and that corporate combinations are subject to the Act. As in every case of a corporate combination, competition of course wholly ceases among those combining, it appeared probable that every great corporate combination in the country was liable to prosecution and dissolution under the Anti-Trust Act.

Not until the decisions of the Circuit Court of Appeals for the Southern District of New York in 1908 which decreed the dissolution of the American Tobacco Company,³ and of the

¹ 23 HARV. L. REV. 353.

² 23 HARV. L. REV. 373.

³ United States v. American Tobacco Company, 164 Fed. 700.

Circuit Court of Appeals for the Eastern District of Missouri in 1909 which decreed the dissolution of the Standard Oil Company,⁴ did general recognition of the practical significance of the law become acute. Public attention thereupon was concentrated on the Supreme Court to a greater extent than ever before in its history. Would the Supreme Court dealing with the Standard Oil and Tobacco cases on appeal confirm the existing interpretation of the Anti-Trust Act? That was the question which agitated the commercial world for many months.

The decisions, when they came, justified those who believed that the logic of facts was stronger than the logic either of theories or even of tolerably well settled law. In the two great recent cases, the Supreme Court effectually changed existing law. Confronted by a crisis, the judges had to choose between intellectual consistency and the practical demands of a difficult situation. In preferring the latter they merely obeyed a characteristic trait of the English-speaking race.

In this article it is proposed first to state and discuss the facts and opinions in the two cases recently decided; second, to state the principles of law and rules of conduct fairly to be drawn from these cases; third, to consider very briefly the effect of the decisions on the trust problem.

I.

The vital words of the Anti-Trust Act under which the proceedings in both cases were brought are found in the first two sections and are as follows:

"SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations is hereby declared to be illegal. [Such acts are made criminal and penalties provided.]

"SECTION 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations shall be deemed guilty of a misdemeanor and . . . [Penalties are provided]."

⁴ United States v. Standard Oil Company of New Jersey, 173 Fed. 177.

*Standard Oil Case.*⁵

The decree of the court below was against seven individual defendants, the Standard Oil Company of New Jersey, thirty-six other American corporations, and one foreign corporation. Four corporations did not appeal from this decree.

To state accurately the facts on which the decision rests is difficult, for the following reason: The court summarizes the averments of the bill, but does not expressly state what averments are found to be true. It speaks of the evidence as "a jungle of conflicting testimony covering a period of forty years." From the general findings of fact, and from the characterization of the acts and doings of the combination, however, it is a fair inference that the specific facts very briefly summarized below were found by the court to be true.

In 1870 John D. Rockefeller, William Rockefeller, and several other individuals who previously had composed three separate partnerships, organized the Standard Oil Company of Ohio. To this company they transferred the business of the three partnerships. Shortly afterwards, several other individuals, including some of the defendants, transferred their plants and business either to the corporation or to individuals as trustees, who held the property so conveyed for the benefit of the stockholders of the Standard Oil Company of Ohio in proportion to their stock ownership. By the year 1872 the combination had acquired all but three or four of the thirty-five or forty oil refineries located in Cleveland. Some of these were dismantled, and some were continued in operation. Subsequently other refineries situated in New York, Pennsylvania, Ohio, and elsewhere were acquired. The combination also obtained control of the pipe lines. It obtained preferential rates and rebates from railroads. By these means many competitors were either forced to become parties to the combination or were driven out of business. During the period from 1870 to 1882 the combination acquired control of ninety per cent of the business of producing, shipping, refining, and selling petroleum in the United States.

In January, 1882, all or part of the stock of forty corporations and limited partnerships forming or affiliated with the combination, including all the stock of the Standard Oil Company itself, together with considerable tangible property, were conveyed to nine trus-

⁵ Standard Oil Company of New Jersey v. United States, 221 U. S. 1 (1911).

tees. The trustees were to hold the trust property for twenty-one years after the death of the last survivor of the trustees unless the trust was sooner terminated by vote of the shareholders in the trust. Under the trust agreement the trustees were given very broad powers to carry on and to extend the business of the combination. Among other corporations organized by the trustees was the Standard Oil Company of New Jersey.

In March, 1892, the Supreme Court of Ohio decided that the making and operation of this trust was beyond the corporate power of the Standard Oil Company of Ohio, and also that it was illegal in itself as being in restraint of trade, and amounting to the creation of an unlawful monopoly. It was therefore voted by the trust certificate holders to terminate the trust, but whether the subsequent proceedings actually amounted to a complete dissolution of the same appears to be doubtful. At this time the trustees held stock in eighty-four companies. They transferred the shares of sixty-four of these companies to the remaining twenty, of which the Standard Oil Company of New Jersey was one. Twenty companies then held shares of sixty-four other companies. Trust certificates were then exchanged for stock of these companies.⁶ As the nine individuals who were trustees held, themselves or through their families or associates, much more than a majority of the trust certificates, they held after these proceedings much more than a majority of the shares of the twenty stock-holding companies. The control of the combination therefore remained in the same hands.

In January, 1899, the charter of the Standard Oil Company of New Jersey was amended so that it had very wide powers, and so that its capital was increased from \$10,000,000 to \$110,000,000. The seven individual defendants continued to be a majority of its board of directors. The shares of the other nineteen stockholding companies were then transferred to the Standard Oil Company of New Jersey in exchange for its common stock, and this stock was then distributed among the shareholders of these nineteen com-

⁶ There were outstanding at this time 972,500 shares of the par value of \$100 each of trust certificates. On the dissolution each holder of trust certificates was to receive $\frac{1}{972,500}$ of all the stock of the twenty stock-holding companies for each certificate he held. No trust certificate holder was permitted to take a share of stock in any one or more, less than all, of the twenty companies, but was obliged to take a share in all. Not all certificate holders came in under this arrangement.

panies. The New Jersey corporation also acquired stock of still other companies.

The combination continued to receive rebates and discriminations from railroads, made contracts with competitors in restraint of trade, indulged in local price-cutting, spying on competitors, and the operation of bogus independent companies. Of course it arranged matters so that there was no competition between its own subsidiary companies.

The court found generally that there had been consistently an acquisition of every efficient means by which competition could have been asserted; that means of transportation had been absorbed and brought under control by slow but resistless methods; that the country had been divided into districts and the trade of each district taken over by a designated corporation within the combination and all others excluded. It characterized the acts and doings of the combination in the following words:

"we think no disinterested mind can survey the period in question without being irresistibly driven to the conclusion that the very genius for commercial development and organization which it would seem was manifested from the beginning, soon begot an intent and purpose to exclude others which was frequently manifested by acts and dealings wholly inconsistent with the theory that they were made with the single conception of advancing the development of business power by usual methods, but which, on the contrary, necessarily involved the intent to drive others from the field, and to exclude them from their right to trade, and thus accomplish the mastery which was the end in view."⁷

It was held:

1. That the Anti-Trust Act prohibited unreasonable or undue restraint of interstate trade or attempts to monopolize the same in any and every form.

2. That the mere transfer to the New Jersey corporation of the stocks of so many other corporations which might have become competing corporations, even if they were not actually so before the transfer, created a *primâ facie* case or presumption of an intent and purpose to dominate the oil industry illegally, that is, by interfering with the right of others to trade, and so to restrain interstate trade unduly.

3. That this presumption was made conclusive by the continued

⁷ 221 U. S. 76.

course of conduct of the persons interested; by the way in which the power acquired had been exerted; and by the results which occurred; because all these showed a purpose to control the situation by preventing free action on the part of others.

4. That the combination was illegal under both the first and second sections of the Act.

The opinion of the court was delivered by White, C. J. He states that the legal problem at hand is to discover the meaning of the first and second sections of the Anti-Trust Act. It appears to the writer that the process adopted by the court in ascertaining this meaning was to wipe the slate clean and start afresh. If there had never before been a decision on the Anti-Trust Act, the construction adopted in the Standard Oil case could hardly have been reached more independently than it was. This construction was based, not on the authority of previous cases on the statute, but on a practically *de novo* consideration of the Act in light of its intent and of general legal principles.

To arrive at the meaning of the words "restraint of trade" and "monopolize" as used in the statute, the court first discusses the meaning of those terms at common law. This discussion is a piece of exquisite exposition.

Starting with the technical or rudimentary monopoly, namely, a grant by the sovereign power of the exclusive right to trade in a particular commodity, and the real or technical contract in restraint of trade, namely, a voluntary restraint put by contract by an individual on his right to carry on his trade, it is shown that both the general and the specific evil results of each were, broadly speaking, the same. The general result was the acquisition of power to control the situation; the specific results were the creation or enlargement of power to fix prices, the limitation of production, and the deterioration of product. Because these results were an injury to the general public the acts or conditions causing them came to be held illegal. As time went on, it was seen that the same evil results were frequently brought about by acts and conditions which were technically neither monopolies nor restraints of trade. Attention was naturally directed to the results. Thus, by a perfectly natural mental process, acts which brought about the baneful effects of monopolies or restraints of trade were in the course of time referred to as monopolies or restraints of trade, and the scope

of these terms was much enlarged. As opinion on economic or trade matters varied from time to time, acts which at one time were thought to produce the evil results of monopolies and which therefore were treated as illegal, were at another time believed not to produce such results and were in consequence treated as legal. The history of engrossing, regrating, and forestalling illustrates this. Although opinion as to specific acts changed, the principle or formula by which the acts were tested remained the same. The broad question was always this: "Is this a case where the general public is injured?" If the acts constituted an attempt to acquire power to control the situation, a power which may be designated monopoly control; or, what is generally involved in any such attempt, if they constituted an interference with the free right to trade of persons not responsible for or connected with the acts in question, that is, persons who were outsiders to the transaction, the answer was, — yes. If, on the other hand, the acts could fairly be considered merely as efforts to forward the personal interest of those acting and not to acquire monopoly control, the answer was, — no.

The next step in the court's reasoning is thus described by itself in the opinion in the Tobacco case:

"Applying the rule of reason to the construction of the statute, it was held in the Standard Oil case that, as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Anti-Trust Act, only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition, or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance."⁸

By regarding the spirit or fundamental basis of the prohibitions against restraints of trade at common law, and relying on this rather than on the definite prohibitions themselves, the court thus arrives at the proposition that the test of illegality under the statute is whether the assailed transaction or condition (in this case the existence of the combination in the form of a holding company) represents a purpose to acquire monopoly control, or what is, prac-

⁸ 221 U. S. 179.

tically speaking, the same thing in the case of a corporate combination, whether it represents an interference with the right of others to trade.

The decision itself rests on nothing less than the whole course of conduct of the persons and corporations involved, although acts done before the passage of the Anti-Trust Act were considered only in arriving at the intent with which subsequent acts were done. The principal specific act relied on by the court was, of course, the transfer of shares by the nineteen stockholding companies to the New Jersey corporation. This was the only definite act of combination after 1890, when the Anti-Trust Act was passed.

It is worth while to analyze the court's treatment of this transfer of shares. In the first place it must be noted that the court, in this particular case, had to take a step in the process of reaching its conclusion, which would not ordinarily be necessary in dealing with a combination. The court had, in effect, to come to the conclusion that the twenty corporations concerned stood on the same basis as competing corporations, or perhaps it would be better to say as independent corporations not definitely combined under one control. That they were not actually competing corporations was the point chiefly relied on by the defense in the pleadings and most strongly urged by counsel for the defense in the argument. The argument was this: All these twenty companies were controlled before the transfer by the same persons who afterwards controlled the New Jersey company. Therefore the transfer of stock accomplished nothing. Is the situation any worse as regards restraint of trade when the shares of nineteen companies are held by one corporation, the stockholders of which previously held in the same proportion the shares of the transferring corporations, than when the shares of all were held by the present stockholders of the holding company?

To this the court answered very truly: "It is." The reasoning in reaching this conclusion must have been something like this: Many or even comparatively few individual stockholders may cease to act together; when some die their stock will be distributed, perhaps widely so; some may sell stock in one or more corporations and retain stock in others; even if none of these events occur the practical convenience of controlling one corporation is vastly greater than that of controlling twenty. It is a different thing alto-

gether. If there are twenty or forty distinct corporations, even if the stock of all of them is held by the same individuals in the same proportions, competition between the corporations is likely to ensue, if not immediately, at least sooner or later.

Having thus arrived at the point of considering, for the purposes in hand, the transferring corporations and the New Jersey corporation on the same basis as any twenty competing corporations engaged in a trade, the court found the mere transfer to the New Jersey corporation to make out a *primâ facie* case of an intent to dominate the trade illegally. The case, however, was only *primâ facie*. If it could have been shown that the combination effected by the transfer was simply and solely for the purpose of securing greater industrial efficiency, and was entirely unaffected by any attempt or intent to acquire monopoly control, or in other words to interfere with the competition of outsiders, the *primâ facie* case or presumption would have been rebutted. In other words, and here is where the great change from the previous interpretation of the Act was made, the court refused to hold that the mere ending of competition among the twenty combining companies was of itself illegal.

In the case under discussion there was not only nothing to rebut the presumption, but on the contrary facts, consisting of the continued conduct of the persons interested and the results attained, which made the presumption conclusive. The court might have said in explaining its decision: "These corporations must be kept apart, because the whole course of conduct of those responsible for them shows that they have used, do use and will use their unified power to oppress the public and to kill off and prevent competition by unfair methods. Other twenty companies which can show that they have no such purpose may come together."

The most striking phase of the decision is the determination that combination is not necessarily illegal, and the converse proposition that combination is unnecessary to bring a case within the statute. In the great previous case on the statute, the Northern Securities case,⁹ the whole controversy revolved around the question of finding a combination, the difficulty of doing which proved a stumbling block to four members of the court. In the Standard Oil case technical questions do not trouble the court in the slightest degree.

⁹ 193 U. S. 197 (1904).

Without argument it assumes that the Act applies to the prohibited evils in any and every form whatsoever. It clearly appears that the Act would have been held violated even if the New Jersey corporation had acquired the actual plants of the other companies.

The construction of the Act thus adopted by the court in this case made a substantial change in the law. To state the change accurately it is necessary to draw a distinction between loose combinations, where independent identities are maintained, and corporate combinations, where identities are merged, in a word, between combinations by fusion and combinations by agreement. There has been much unnecessary confusion of thought in many of the Anti-Trust cases through failure to make this distinction. Yet the two forms of combination are inherently different and must be treated differently. It is a great misfortune that the distinction between loose combinations and fusion is not clearly made in this case, it being evident that the court properly applies a different test to each.

Former cases decided that any "direct," that is, any substantial, restraint of competition is illegal; that trade is restrained by the ending or limiting of competition among those who voluntarily combine, whether in the form of a corporation or not, and that this is true whether or not the combination affects the competition of outsiders, that is to say, of those who, if left free to act, would prefer to compete. This case decides that the test of illegality as to combinations by agreement is whether they lessen competition among those combining in a way or to an extent which may reasonably be thought to injure either the competing or consuming public. In other words it applies to such combinations precisely the same test which the common law applies to contracts in restraint of trade.¹⁰ As applied to corporate combinations, and it is with a corporate combination that the decision deals, the test is not the termination of competition among those combining, necessarily complete and entire in every case of a corporate combination, but whether the combination directly affects the competition of outsiders. To express the same thing in different words: Former cases decided that the Act forbade the substantial lessening

¹⁰ Of course combinations by agreement frequently have also for an object the direct purpose of preventing the competition of outsiders. *Montague v. Lowry*, 193 U. S. 38 (1904).

of competition by agreement or combination, and that the function of the court was merely to decide if competition had been substantially lessened in such manner. This case decides that the substantial lessening of competition is illegal only if in the opinion of the court the public is injuriously affected. There was then a change from prior law as to the test of illegality no matter by what name it is called.

An interesting controversy in which the court itself has taken sides has arisen as to whether the court, in this case, read the word "unreasonable" into the statute.

The court says, in the Tobacco Case, it did not. With great deference the writer insists that in effect it did. The court says that it did not decide that only unreasonable restraints of trade were illegal, but that it gave to the words "restraint of trade" a reasonable meaning; or construed them "in the light of reason"; or adopted the "rule of reason." In this case, however, in giving them a reasonable meaning, the court gave to the words "restraint of trade" the same meaning that they had at common law, and the common law reads the word "unreasonable" before the words "restraint of trade" wherever they occur. It is submitted that this particular meaning of those words is what the phrase "the rule of reason" was intended to cover. Of course the court might have meant something else by the "rule of reason," and in certain parts of the opinion, as mentioned later in this article, the court speaks as though it had meant something else. It might have meant the use of judicial intelligence in construing a doubtful statute, as distinguished from the use of mere perception in deciding whether a perfectly definite thing had been done. Of course it is entirely possible to give the words "restraint of trade" a reasonable meaning which is not equivalent to reading "unreasonable" into the statute. Previous cases gave the words a perfectly reasonable meaning in holding that they meant the lessening of competition to a substantial extent by combination or agreement. If this is what the court meant by its "rule of reason," it meant no more than that it acted as courts have acted from time immemorial, and as they always must act in construing a statute whose meaning is not precise. In such case, the emphasis on the "rule of reason" as a principle of law now applied to the Anti-Trust Act was entirely superfluous. It was not worth mentioning. It certainly did not

require an elaborate discussion of the common-law meaning of the words "restraint of trade" on which to base its adoption. This discussion, on the other hand, was appropriate to justify reading the word "unreasonable" into the statute.¹¹ That it was intended for this purpose seems evident from the following language of the court:

"And as the contracts or acts embraced in the provision were not expressly defined . . . it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibition contained in the statute had or had not in any given case been violated. Thus not specifying, but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided."¹²

If this were an original judicial construction of the Act, the interpretation adopted could hardly fail to receive general approval from lawyers and laymen. The fact that a substantial change was made from the previous interpretation is, under all the circumstances, not sufficient reason for withholding general approval.

A mistake was made, however, in the effort, which could hardly be successful, to show that the construction adopted was not in conflict with prior decisions. The reasoning in this part of the opinion is a curious production, and suggests either intellectual jugglery or confusion of thought. Having used the "rule of reason" as something requiring an interpretation of the statute based on the common-law meaning of its words, that is to say, an interpretation equivalent to reading the word "unreasonable" into the statute, the court proceeds to use the "rule of reason" in the sense of meaning merely the use of judicial intelligence, for the purpose of showing that the earlier cases are followed. The argument runs something like this: The previous cases could not have been

¹¹ It might be said that previous cases struck out the word "unreasonable" generally implied before the words "restraint of trade" and that this case merely recognized that it was impliedly there.

¹² 221 U. S. 60.

decided unless the judges made some use of their reasoning powers. Therefore, the rule now adopted is really the same as that prevailing before. This ignores the fact that the use of judicial intelligence in the earlier cases produced a different result. In attempting to show that previous cases did not decide reasonable restraints of trade to be illegal, the court makes an effort to distinguish between the lack of power to take out of the statute a case plainly within it, and the necessity of deciding whether a case is in it or not. In light of what was actually done in the previous cases the distinction is not apparent. To the average man this sort of hair-splitting is irritating; and the irritation is not lessened by the involved language in which the reasoning is clothed, suggesting as it does some of Mr. Gladstone's speeches in the House of Commons, when he seemed positively anxious not to cast light on the subject under discussion. Evidently, however, the court is not entirely convinced by its own arguments, because it says:

"And in order not in the slightest degree to be wanting in frankness, we say that in so far, however, as by separating the general language used in the opinions in the Freight Association and Joint Traffic cases, from the context, and the subject and parties with which the cases were concerned, it may be conceived that the language referred to conflicts with the construction which we give the statute, they are necessarily now limited and qualified." ¹³

It is not necessary to discuss former cases nor to quote from opinions of the court to show that the rule previously adopted was that all direct or substantial restraints of competition, whether reasonable or not, are illegal. The fact is obvious from a study of the previous cases, and it is not worth while to emphasize it.¹⁴ It is always possible to say of statements of law in an opinion that they must be taken in connection with the particular facts in hand, and that when so taken they do not mean what they plainly say. But this much is certain. The statements of law in the earlier cases now attempted to be explained away were as pertinent to the decision of those cases, and as definite, as the statement of law insisted upon in the Standard Oil case is definite and pertinent to its deci-

¹³ 221 U. S. 67.

¹⁴ *United States v. Trans-Missouri Freight Association*, 166 U. S. 290 (1897); *United States v. Joint Traffic Association*, 171 U. S. 505 (1898); and see particularly opinions in *Northern Securities Co. v. United States*, 193 U. S. 197 (1904).

sion. There is no more reason for limiting the meaning or weight of the one than of the other. If the present case decides that only undue restraints are illegal, the previous cases decide that all restraints are illegal.

The remedy which the Supreme Court applied was this: The New Jersey company is directed to return to the stockholders of the subsidiary companies the stock which had been turned over to the New Jersey company in exchange for its stock. In the meanwhile the New Jersey company is forbidden to exercise any ownership or to exert any power directly or indirectly over the subsidiary corporations, and the latter are forbidden to pay any dividends to the New Jersey corporation or do any act recognizing the power of that company. The owners of stock of the subsidiary corporations are forbidden to do any act or make any agreements tending to produce further violations of the Anti-Trust Act. Six months is allowed to bring about the dissolution.

Harlan, J., delivered an opinion concurring in part and in part vigorously dissenting. He agrees that the Standard Oil Company of New Jersey and its subsidiary companies constitute a violation of both sections of the Act. He objects strongly to the adoption of the so-called rule of reason, and says very truly, "that the court has upset the long-settled interpretation of the Act." He sustains this by copious quotations from the opinions in previous cases, particularly, of course, from the *Trans-Missouri Freight* case¹⁵ and the *Joint Traffic Association* case.¹⁶

He argues that the law having been settled by Congress, for the court to change it is performing an act of judicial legislation, and that there is a usurpation by the judicial branch of the government of the functions of the legislative department. In making this criticism the learned justice overlooks the fact that the law, as it stood before this decision, was not settled by Congress, but by the court. What Congress meant is very doubtful. There was just as much judicial legislation in deciding that restraint of trade covered all restraint as in deciding that it covered only unreasonable restraint. In fact the decisions on this Act constitute a long course of judicial legislation. The court in the *Standard Oil* case may be criticized, if one likes, for overruling previous decisions, but hardly on the ground that it was legislating.

¹⁵ 166 U. S. 290.

¹⁶ 171 U. S. 505.

It did so no more than a court customarily does in interpreting a loosely worded statute, and acted with utmost propriety.

Finally, he makes a very good point of the practical difficulty there will be in deciding whether a combination is reasonable or undue, and suggests that much litigation may ensue.

*American Tobacco Case.*¹⁷

The court's statement of the undisputed facts in this case makes fascinating reading. Within the limits of this article it is impossible to set forth more than the barest outline.

The defendants in the case were twenty-nine individuals, sixty-five American corporations and two English corporations. The primary defendant was the American Tobacco Company, a New Jersey corporation. It maintained unified control over the combination through stock ownership, not, however, by the simple, obvious, and consistent method of itself holding the majority of stock of the various corporations, as in the Standard Oil case, but in the most devious, complicated, and roundabout ways imaginable. As a single typical example, the primary defendant owned less than half of the shares of the American Snuff Company, one of the principal defendants, directly, but owned practically all the shares of the P. Lorillard Company, one of the subsidiary defendants, and the P. Lorillard Company owned a very large proportion of the shares of the American Snuff Company. The only approach to a principle discernible in the scheme of stockholding which characterizes the combination is an apparent effort to obscure the real situation; although there came to be finally one principal corporation for each branch of the trade.

The short history of the combination, necessarily told in only general terms, was as follows: Before 1890 all products of tobacco in this country were marketed under strictly competitive conditions. The manufacture of tobacco in its various forms was successfully carried on by many individuals and concerns scattered throughout the country. The nucleus of the combination was the result of action on the part of certain manufacturers of cigarettes. There were five concerns which did ninety-five per cent of all the domestic cigarette business, but which manufactured and distributed less than eight per cent of the smoking tobacco produced in the

¹⁷ United States v. American Tobacco Company, 221 U. S. 106 (1911).

United States. These companies were active competitors, and just before 1890 were engaged in fierce and abnormal competition. In January, 1890, these five concerns organized the American Tobacco Company of New York, having broad powers, and with a capital stock of \$25,000,000. They conveyed the assets, business, good-will, and names of the old concerns to this corporation, which thereafter carried on the business of all.

Then followed an increase of capital and the purchase of the business of others engaged in the tobacco trade. The purchases were not confined to the cigarette business, but came to include every branch of the tobacco business, and also businesses which merely handled materials required in the tobacco trade. During the whole life of the combination prices entirely out of proportion to actual values were paid for competing concerns. In many cases the plants so acquired were dismantled and abandoned. For example, from 1899 to 1901, thirty competing concerns were bought out for \$50,000,000 in cash or stock and were immediately closed. Many other concerns were acquired and their business continued. In practically every case covenants were taken from the vendors not to engage in the tobacco business for long terms. There was continually aggressive competition resulting in driving others out of business, or compelling them to enter the combination. For example, in the plug tobacco war the combination lowered the prices of plug tobacco below its cost and in the course of the competition actually lost \$4,000,000. Until 1904 there were really three primary corporations controlling the combination, namely, the American Tobacco Company of New York, the Continental Tobacco Company, and the Consolidated Tobacco Company, the last named being a financing corporation. At that time these three companies were merged into the American Tobacco Company of New Jersey. This company was capitalized at \$180,000,000 and is the primary defendant. Throughout the history of the combination six of the individual defendants were practically in control.

It was held:

1. That the Anti-Trust Act prohibited unreasonable or undue restraint of interstate trade or attempts to monopolize the same in any and every form. The construction of the Act adopted in the Standard Oil case is approved and reaffirmed without qualification.
2. That the facts in the case show an undue restraint of trade

because of the obvious intent proved to dominate and control the tobacco business by interfering with the right of others to trade.

3. That the combination in all its parts, whether regarded collectively or separately, and irrespective of control through stock ownership, is illegal under both the first and second sections of the Act.

The opinion of the court was delivered by White, C. J. Referring to the decision in the Standard Oil case, the court says that the present case

"if possible serves to strengthen our conviction as to the correctness of the rule of construction — the rule of reason — which was applied in the Standard Oil case, the application of which rule to the statute we now, in the most unequivocal terms, re-express and re-affirm."¹⁸

Again an attempt is made to show that the rule adopted is in accord with previous decisions; and again the attempt is unsuccessful. This time referring to what was done in the Standard Oil case the court elaborates the proposition that there is a distinction between the lack of power to take out of the statute a case plainly within it and the necessity of deciding whether a case is in it or not. On this point the court says:

"In other words, it was held not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable, but that the duty to interpret, which inevitably arose from the general character of the term 'restraint of trade' required that the words 'restraint of trade' should be given a meaning which would not destroy the individual right to contract, and render difficult, if not impossible, any movement of the trade in the free channels of interstate commerce, — the free movement of which it was the purpose of the statute to protect."¹⁹

Here again it is difficult to perceive any real distinction. What sort of act, or agreement, or combination, for instance, would the court hold to be a reasonable restraint of trade and yet, giving the words "restraint of trade" the reasonable meaning it does give them, decide to be forbidden by the Act? It might appear from certain language in the Standard Oil case²⁰ that the court felt that there were certain acts *ipso facto* illegal as being in restraint of trade, while other acts depended on surrounding circumstances. If this was

¹⁸ 221 U. S. 180.

¹⁹ 221 U. S. 179.

²⁰ Quoted *supra*, p. 37.

the court's meaning it is left obscure. In fact, if a distinction exists, it is thin and tenuous as gossamer. To quote, with great deference, words of the learned Chief Justice himself, "the difference between the two is therefore only that which obtains between things which do not differ at all." It seems to the writer that in attempting the impossible task of reconciling these cases with prior decisions, the court becomes involved in some confusion. This is indicated to some extent by the fact that the attempt in each case takes a different form. In the Standard Oil case the effort was to show that previous cases did not decide that reasonable restraints were illegal. In this case the effort is to show that the Standard Oil case did not decide reasonable restraints to be legal. Either contention, if sound, would sufficiently support the court's position. In relying on both the court seems to confess a suspicion of the unsoundness of each. After all, however, the importance of these decisions lies neither in the use of particular words, nor in the fact that a substantial change as to the test of illegality, no matter by what name it was called, was made, but in the fact that they represent a sound and enlightened interpretation of the Act. Moreover it is no more than simple truth to say that the opinions in these cases, considered at large, in their broad-minded and wise treatment of a matter of almost unparalleled difficulty are superb specimens of the highest form of performance of the judicial function.

The court is particularly successful in demonstrating the good sense and practical necessity of the rule adopted. The reasoning is sound and convincing. The statute cannot be interpreted strictly, that is, following the literal meaning of its words, and loosely, that is, according to its spirit and intent, at one and the same time. The court must decide which method of interpretation will secure the better results. If the statute is construed strictly and literally it will cover any and every combination, and nothing which cannot be tortured into a combination. As combinations may be either beneficial or harmful, and as there may be injurious restraint of trade even though nothing which is technically a combination exists, such an interpretation would at once destroy much that is good and permit much that is evil, and so cover both more and less than the statute intended. The reasonable construction is to follow the spirit and intent of the statute. Such an interpretation does not regard form, but covers all acts or conditions which inter-

fere with the rights of outsiders, and which may be referred to loosely as wrongdoing.

The court proceeds to test the undisputed facts by the rule adopted. The enumeration of the facts which lead the court to its decision is the most valuable part of the opinion. The court felt that there was a purpose to acquire dominion and control of the trade by excluding others or by interfering with the right of outsiders to trade, and therefore an illegal combination, for the following reasons:

The first combination was impelled by a fierce trade war which itself was evidently inspired by one or more of the persons who brought about the combination.

The acts which followed the forming of the combination, such as the plug war and the snuff war, and the war with the English producers, indicated the intention to monopolize the whole field either by driving competitors out of business or compelling them to become parties to the combination.

The way in which control was secured secretly and the actual results obscured, by devious methods of stockholding, showed a conscious wrongdoing with intent to obtain mastery. This intent is further indicated by the absorption of elements essential to the manufacture of tobacco products, such as tinfoil, liquorice, and boxes, which kept others out of the trade.

The expenditure of millions of dollars in buying plants which were not used but closed up was merely buying off competition.

The almost uniform practice of obtaining agreements from the vendors not to engage in the tobacco trade, regarded not as separate transactions, but as a whole, showed the same purpose, namely, to control the situation by excluding others.

The court expressly states that the decision is not based on the following facts:

Not because of the vast amount of property aggregated by the combination;

Not alone because many corporations were united by resort to one device or another;

Not alone because of the dominion and control which exists over the tobacco trade.

The principle laid down in the Standard Oil case, that the form in which the assailed transactions are clothed is immaterial, is re-

affirmed, and, if possible, accentuated. The court states the rule to be

"that the generic designation of the first and second sections of the law, when taken together, embrace every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed." ²¹

Under this broad rule of law the court finds the combination illegal in all its aspects. The ownership of stock by the primary defendant in the accessory and subsidiary defendants, and the ownership in any of these companies, one with the other, and among themselves, is illegal. The primary defendant, which was formed as a combination between other companies, is illegal in its very existence. Irrespective of the question of stock ownership, the relations of the companies by contract and otherwise make every part of the combination illegal.

The first paragraph of the decree could hardly be broader, and gives effect to the widest possible construction of the Act. It is:

"That the combination, in and of itself, as well as each and all of the elements composing it, whether corporate or individual, whether considered collectively or separately, be decreed to be in restraint of trade and an attempt to monopolize and a monopolization within the first and second sections of the Anti-Trust Act." ²²

Indeed the words, "whether considered collectively or separately," if understood to mean what they say, seem too broad. Considered separately, it cannot be that each and every part of the combination is illegal.

The court states that the only way to deal with the case is to give a wider application to the Act than ever has been done before. This is particularly true when it comes to the remedy. Evidently a mere decree forbidding stock ownership by one part of the combination in another would be insufficient even if it were possible to carry it out. The court's conclusion as to the proper remedy is summarized in the decree as follows:

That the court below, in order to give effective force to the decree, be directed to hear the parties by evidence or otherwise as it may deem proper for the purpose of ascertaining and determining upon

²¹ 221 U. S. 187.

²² 221 U. S. 187.

some plan or method of dissolving the combination, and of recreating, out of the elements now composing it, a new condition which shall be honestly in harmony with and not repugnant to the law. Six months are allowed to do this. If the court below thinks best, the time may be extended for not more than sixty days. If a conclusion satisfactory to the court has not been reached at the end of the period allowed, the court below may grant a permanent injunction restraining the movements of the parties to the combination in interstate commerce, or it may appoint a receiver. During the time allowed for reconstruction all the defendants are restrained from doing any act to extend the combination further.

This is, of course, the most radical and striking remedy ever decreed under the Anti-Trust Act — one of the most striking and unusual ever provided for by a court of equity. The judicial branch of the government becomes, to all intents and purposes, an active party to a business reorganization.

In light of the near prospect of a final decree in this case, to discuss at this time any further the remedy provided by the Supreme Court would be premature.

Harlan, J., delivered an opinion concurring in part and in part dissenting, in which he reiterates the statements made by him in the Standard Oil case. In addition he suggests that, as the present combination was illegal under any possible construction of the statute, so much of the opinion as deals with the rule of reason is *obiter dicta*.

II.

It is now proposed to state as definitely as possible the rules of law to be drawn from these decisions. As a general summary the following is offered:

Any undue or unreasonable restraint of interstate trade is illegal. Trade is unduly restrained by agreements which lessen competition among those agreeing to an extent which may reasonably be thought to injure the competing or consuming public. Trade is also restrained unduly by acts, combinations, or mere conditions of existence, which represent a purpose to increase the trade of those who are parties to the assailed transaction or condition, by interfering with the right to trade of those who are strangers to such trans-

action or condition; or, in other words, a purpose to acquire monopoly control. Trade is not unduly restrained by the termination of competition among those who voluntarily combine in the form of a corporate combination. Nevertheless, the combination of a great number of previously independent corporations, certainly if by means of a holding company, and probably if by means of the purchase of plants outright, creates a *primâ facie* case of illegality. Given an undue restraint, the law can reach any possible form of organization or condition of existence in which such restraint is manifested. A single corporation in no way representing any combination may offend the Act. The issue is to be determined in each case by a consideration of all the pertinent facts, such as specific acts, general course of conduct, and results.

The above general summary may be made clearer by additional and more specific statements.

A combination may be made of any number of corporations in a given trade, and maintained by means of a holding company or through ownership of plants, provided it appears that, tested by actual facts, the combination represents a purpose not to acquire monopoly control, but some proper purpose, such as to secure greater industrial efficiency; to turn out a better product at a lower selling price; in a word, to share with the public the economic advantages lying in the fact of combination.

Nevertheless, as the mere formation of a great combination suggests an inference that there is an intent to control the situation, the burden of proving facts showing a rightful purpose is put on the combination.

A corporation, whether it represents a combination or not, may increase its business to any extent, even up to the point of acquiring the whole of a given trade, if it does so not by interfering with the right of others to compete, but by means of proper methods. Proper methods can be completely defined only after some decision which shall hold a great combination legal. The following are obviously proper methods; excellence of product, lowness of selling price, efficiency of management, skill in marketing of product, and ability to attract the custom of the public by reason of the above methods and by advertising. To meet increased trade acquired by proper methods, a corporation, whether it represents a combination or not, may increase its capital to any amount, extend its plant to any

size, and may purchase the plants of any persons or corporations who are genuinely willing to sell.

A corporation, whether it represents a combination or not, may not attempt to acquire monopoly control. It may not increase its trade by interfering with the right of others to trade, that is, by killing off or preventing the competition of outsiders by means of unfair methods. Unfair methods are many, and no general description can cover them all. Broadly speaking, they consist principally in acts which, *standing alone*, are not for the benefit of the corporation, but for the purpose of injuring others. For example, to give three specific instances, to sell goods at less than cost, to pay a large sum for the plant of a competitor and then abandon the plant,²³ to expend money in acquiring sources of supply to an extent very much greater than is needed or can be reasonably needed in the future, — are acts which, standing alone, do not benefit a corporation but injure it. Conceivably each of these acts might be proper to meet some special exigency. Probably, however, they are done respectively to kill off, to buy off, and to keep off competition. All clearly represent a purpose to acquire monopoly control. Other acts suggested by these cases which tend in varying degree to show an improper purpose are; securing rebates from railways, spying on competitors, selling low in one place to meet local competition, uniformly or generally making contracts with persons whose business is bought that such persons shall not compete for long periods in the future, and the operation of bogus independent companies. In the same class fall naturally discriminations, such as refusing to deal with competitors, or persons who deal with competitors.

Definite and certain rules of conduct are still lacking, and are sadly needed, but business and law are no longer in an *impasse*. Combination is not now illegal, though combination on a large scale, in that it constitutes a *prima facie* case of illegality, is still perilous.

But the subject of attack is not the perfectly sound economic principle of combination, but monopoly control and unfair methods; loosely speaking, wrongdoing.

Throughout both opinions, it is the rights of outsiders, of strangers

²³ The injury to outsiders, it must be admitted, is here indirect, and therefore not entirely within the general rule suggested in this article. The intention to work an indirect injury, however, is obvious.

to the assailed transactions, which are insisted upon. The dominating note of the recent decisions is this warning addressed to business men: "You shall not interfere unfairly with the rights of others."

III.

It remains to consider where these decisions leave the trust problem, or, to put it more broadly, the general business situation.

Here again it is necessary to call attention to the distinction between combinations by agreement and combinations by fusion, namely, corporate combinations. It is unfortunate that there has been only one statute to apply to both. This has resulted in an effort to treat them on the same basis, and this effort has done much to obscure the economic situation and to defer a clear understanding of the trust problem. The course of decision may be briefly indicated as follows:

In the first instance it appeared that loose combinations were clearly forbidden by the Act, and their evil results were recognized by the court. The first effect of the Anti-Trust Act was to drive combinations into the corporate form. Then it was seen that similar evil results were due to corporate combinations, and the Act was applied to them on the same terms in which it had been applied to loose combinations. Still later it was perceived that to destroy all corporate combinations was flying in the face of sound economic laws. Therefore, in the recent decisions it was declared that only those representing an economic evil, namely, monopoly control, were subject to the Act. At the same time it was felt necessary to permit loose combinations also if they did not unduly restrain trade.

That the recent decisions, nevertheless, make a distinction, though apparently unconsciously, in applying a test of illegality, between combinations by agreement and corporate combinations, is shown by the fact that the complete cessation of competition among the members of a corporate combination is held to be not necessarily illegal. The distinction was one which must be made. It is a pity that it was not clearly and definitely made, especially with reference to the question of remedy. Because it produces many of the same evil results is not sufficient reason for treating the corporate combination on the same basis as the combination by agreement. In the case of combinations by agreement the persons

contracting are strangers to one another's business; the duration of the combination is temporary, and the bonds that unite it are weak; no sacrifice of individual identity is involved; the object is merely to restrict competition among independent business units; none of the real economic benefits of combination are secured; the operations of the combination are not subject to a publicity which will permit potential competition to know the facts; and, lastly, the combination by agreement can be definitely handled only by dissolution. None of these things is true as to the corporate combination.

The trust problem is really concerned with corporate combinations, and these alone are referred to in the following discussion.

The Standard Oil and Tobacco cases represent a sound analysis of the trust problem which must have been substantially as follows: The fundamental reasons why combinations are made are: 1. To secure the economic benefits of the fact of combination;²⁴ 2. To save the wastes of competition;²⁵ 3. To acquire monopoly control, that is, the power to dictate terms and fix rates.

Combinations founded and maintained on the basis of the first two reasons are inherently sound. They represent real economic value. Under proper conditions they result in better products and lower selling prices.

²⁴ These are:

1. Opportunity for comparative administration and accounting among the several corporations merged.

2. Ability to buy in large quantities and therefore cheaply.

3. More perfect organization. This includes saving in salaries of higher officials. Where before there were paid vice-presidents and superintendents for each plant, there need now be only one superintendent and one set of higher officials for a district.

4. Ability to handle large orders.

5. Ability to sell in large quantities, and therefore at a smaller percentage of profit.

6. Ability to save charges of transportation by shipping from the plant nearest in location to the consumer.

7. Ability to utilize waste.

8. Opportunity for experimentation.

9. Ability to specialize labor.

The corporate combination has the following advantages over the constituent parts acting separately:

1. It can dispense with many travelling salesmen.

2. Its expenditure for advertising will be less.

3. It is in a stronger position to regulate credits.

4. It can regulate production.

See "A Statement of the Trust Problem," 16 HARV. L. REV. 79.

²⁵ See note 10, *supra*.

A combination founded or maintained on the basis of monopoly control, that is, power to deal arbitrarily with the situation, rests on a structure economically rotten and insecure in fact. If given a fair chance, competition will destroy it. Therefore, it is true to say that such a combination owes its very life to interfering with the rights of outsiders, which means, to the use of unfair methods. Monopoly control cannot exist except by an interference with the right of others to trade. A combination which does not interfere with outsiders, that is, which does not use improper methods, does not have monopoly control, no matter what its size or the extent of its business. It is true that a combination formed for a proper purpose, which by proper methods has acquired practically all of a given trade, has a potentiality of evil. Its power is great, and the temptation to use its power arbitrarily for its own benefit is correspondingly great. Assuming that a sufficient degree of publicity of its operations and affairs is required, however, it will, theoretically at least, be unable to misuse its power if it continues to rely only on proper methods. As long as its methods are fair, as long as it does not interfere with the rights of outsiders, outsiders in the form either of actual or potential competitors will keep it in order. Even in the extreme case where there is no actually existing competition the combination cannot raise prices or act in an arbitrary manner without inviting competition. When it does so potential competition will become actual competition, and if given a fair chance will reduce prices to the proper level. If competition is not given a fair chance, that is, if it is fought by unfair methods, the combination becomes an actual economic evil and, under the interpretation adopted, becomes subject to injunction under the Act. Conversely, a corporate combination founded and for a time maintained on the basis of monopoly control, that is, on the use of improper methods, if it relinquishes such methods ceases to be an economic evil, because it then becomes fairly subject to competition, and logically should not be subject to dissolution under the Act.²⁶ The whole question, therefore, comes down to the question of interference with outsiders, that is,

²⁶ Perhaps dissolution of corporate combinations in flagrant cases, like those here considered, may be justified as merely proper punishment. Moreover in the Tobacco case there was hardly a genuine fusion of the combining parts. Unless a corporate combination involves a real merger of its elements it should be dissolved.

to one of methods. It is the definite recognition of the above fact that gives the recent decisions their great importance.

The law as it existed before the recent decisions did not represent a sound analysis of the trust problem. The Act as previously interpreted went on the theory that Congress had decided that the ending of competition merely among the members of the combination was itself an injury to the general public. This is an entirely permissible position to take if the trust problem is considered from a sociological point of view. It may perhaps be better for the country for the law arbitrarily to insist on a larger number of units of business identity even at the expense of some loss of economic efficiency. Nevertheless, even from this point of view, it must be remembered that any arbitrary law is a confession of inability to handle a problem in a manner appealing to reason.

From an economic point of view, the theory of the previous decisions cannot be accepted. As shown above, there is no actual economic evil in a corporate combination so long as there is no interference with the right of outsiders to trade, that is, so long as proper methods are used.

The writer is decidedly of the opinion that the law should deal with the problem from the economic point of view. If this is done wisely the sociological question may safely be left to work itself out. It is by no means certain that with a fair field provided, the strictly business advantages of combination will outweigh the common desire for individual identity. It is true that men do not care to enter a hopeless fight; but the instinct to compete remains a primary characteristic of the American people and requires only opportunity to enter a contest which shall be fair. Human nature may well be too strong for a mere economic principle when the latter cannot call unfair methods to its aid. At any rate the law will have done its share if it insists on an absolutely fair and open path on which events may take their natural course, whatever that may be.

From an economic point of view it becomes continually clearer that what is needed is not the dissolution of existing combinations, nor the arbitrary prohibition of new ones, but the prevention of the evils which frequently if not usually accompany combinations. Unfair competition and discriminations must be forbidden by a law which shall be, so far as possible, actually preventive. In addition

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it must be recognized that distinctions which it is easy and proper to make in theory are difficult to make when dealing with actual facts. There is unquestionably a dangerous potentiality of evil in all great combinations. This means both that they are likely to use unfair methods and also that great harm will be done if they do. Because of the fact that it is probably impossible to reach directly all forms of unfair competition without government supervision, such combinations should be directly supervised by the government to the end that unfair methods be discovered and prevented.²⁷

In the article on the Federal Anti-Trust Act published in March, 1910, before referred to, it was said:

"It can hardly be endured that the law remain in its present state. The logic of events is certain to bring about a change either by continued judicial construction or by legislation."²⁸

It was also said:

"Obviously judicial construction can hardly be expected to cover the ground wholly and finally, even with the freest use of that convenient fiction, 'what Congress must be held to have intended.'"²⁹

That both these statements were warranted is indicated by the two recent decisions.

A substantial change in the law has been made. Judicial legislation could hardly accomplish more than it has done in these cases. It remains true that judicial legislation cannot do everything. A great step has been made towards the solution of the trust problem. It consists in the fact that attack is at last concentrated, not on combination on a large scale, but on the evils and wrongdoing which accompany combination. It remains to clear up the considerable remaining obscurity of the situation by embodying the principles of these great decisions in a statute which shall lay down clear and definite rules of conduct, and which shall not supplant but supplement the Anti-Trust Act as now construed.

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²⁷ The law ought also to define the terms on which combinations may be made and should insist on genuine fusion, either by requiring outright ownership of plants or in some similarly effective way.

²⁸ 23 HARV. L. REV. 377.

²⁹ 23 HARV. L. REV. 379.

PRICE RESTRICTION ON THE RE-SALE
OF CHATTELS.

THE Supreme Court of the United States has, in its recent decision of the case of *Dr. Miles Medical Company v. John D. Park & Sons Company*,¹ denied the right of the owners of chattels, not produced under patents or other statutory grant, to fix the prices at which such chattels might be re-sold to the intermediate dealers and to the ultimate purchasers for use or consumption. The conclusion that the vendor of chattels has no right to impose price-restricting conditions upon their re-sale was reached after arriving at the determination that the manufacturer or producer of chattels in whose production secret processes or other trade secrets are utilized has no different rights in marketing his product than has the owner of general chattel property. The latter determination is of greater interest because it overrides the view which had been generally accepted and had received judicial approval in an overwhelming preponderance of the courts in which this question had been raised.

The bill of complaint in the *Miles* case alleged the manufacture of proprietary articles or medicines under secret formulæ and by secret processes and the sale thereof under trade-marks and distinctive trade dress. In order, as was alleged, to prevent injury to complainant's business by the sale of these articles at competitive or "cut" prices, complainant adopted a system of contracts controlling the sale and re-sale of its preparations. This system contemplated a consignment to wholesale dealers, who were permitted to sell only to other contracting wholesale dealers and to retail dealers who had contracted with the complainant to sell its preparations at certain fixed prices. It was charged that the defendant, after having refused the opportunity to enter into a consignment contract, had unlawfully induced the complainant's wholesale and retail agents, by means of false and fraudulent representations, to violate their contracts by selling articles of complainant's manufacture to the defendant. It was further

¹ 220 U. S. 373 (1911).

charged that the defendant's motive in inducing such breaches of contract was to sell complainant's articles at cost or less to attract and secure custom for other merchandise. An injunction against the continuance of such acts was prayed.

These allegations would apparently bring the complaint within the doctrine that an actionable wrong is committed by one who without justification maliciously interferes between two contracting parties and induces one of them to break the contract to the injury of the other,² and that, in the absence of adequate remedy at law, equity will interfere to prevent the repetition of the wrong.³ The case presented does not raise the question of inducing a breach of trust by an agent, because the contract system contemplated that the restriction should apply to the re-sale of goods when acquired by purchase as well as when held on consignment.

The defendant demurred to the complaint, attacking the legality of the contracts because in restraint of trade, thereby asserting such want of equity in the plaintiff's position as to deprive it of the protection of the court.

The questions raised and considered by the court were therefore limited to

(1) The right of an owner of articles manufactured under secret processes and formulæ to impose such restrictions as above outlined, and

² *Glamorgan Coal Co. Ltd. v. South Wales Miners Federation*, [1903] 1 K. B. 118 (1902), 2 K. B. 545 (1903), 89 L. T. N. s. 393; *Bowen v. Hall*, 6 Q. B. D. 333 (1881); *Cattle v. Stockton Water Works Co.*, 10 Q. B. 453, 458 (1875); *Lumley v. Gye*, 2 E. & B. 216 (1853); *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611 (1902); *Walker v. Cronin*, 107 Mass. 555 (1871); *Plant v. Woods*, 176 Mass. 492 (1900); *Chipley v. Atkinson*, 23 Fla. 206 (1887); *Benton v. Pratt*, 2 Wend. (N. Y.) 385 (1829); *Rice v. Manley*, 66 N. Y. 82 (1876); *Van Horn v. Van Horn*, 52 N. J. L. 284 (1890); *Heath v. Am. Book Co.*, 97 Fed. 533 (1899).

³ *Exchange Tel. Co. v. Central News Co.*, [1897] 2 Ch. D. 48; *Exchange Tel. Co. v. Gregory*, [1896] 1 Q. B. 147 (1895); *Board of Trade v. Christie Co.*, 198 U. S. 236 (1905); *Hunt v. N. Y. Cotton Exchange*, 205 U. S. 322 (1907); *Bitterman v. L. & N. Ry. Co.*, 207 U. S. 205 (1907); *Jones v. E. Van Winkle Gin Works*, 131 Ga. 336 (1908); *Reynolds v. Davis*, 198 Mass. 294 (1908); *Beekman v. Marsters*, 195 Mass. 205 (1907); *Schubach v. McDonald*, 179 Mo. 163 (1903); *Flickenstein Bros. Co. v. Flickenstein*, 66 N. J. Eq. 252 (1904); *Martin v. McFall*, 65 N. J. Eq. 91 (1903); *American Law Book Co. v. Ed. Thompson Co.*, 84 N. Y. Supp. 225 (1903); *Kinner v. L. S. & M. S. Ry. Co.*, 69 Oh. St. 339 (1904); *Flaccus v. Smith*, 199 Pa. St. 128 (1901); *Nashville, etc. R. Co. v. M'Connell*, 82 Fed. 65 (1897); *Sperry & Hutchinson Co. v. Weber*, 161 Fed. 219 (1908); *Iron Moulders' Union v. Allis-Chalmers Co.*, 166 Fed. 45 (1908).

(2) The right of an owner of chattels manufactured or produced under ordinary circumstances to control the prices on all sales of his products.

It is intended in this discussion to consider these questions in the light of the common law only, both because of the impossibility of considering the numerous statutes within reasonable space limits, and because such statutes are either codifications of the common law, or, being wider in their scope, include the common-law prohibitions.

At common law limited restrictions as an incident to the sale of chattels are permissible.⁴ The accepted test is that such restrictions must not be wider than the protection of the parties thereto demands nor so wide as to affect the public injuriously.⁵ Thus a single contract determining the price of the re-sale of chattels, not dealing with all or a material portion of all such chattels in commerce, might, if conditions warranted it, be lawful. This common-law principle is not peculiar to "trade-secret" articles but is equally applicable to any chattel property. Until recently, however, the doctrine was generally accepted that the owner of "trade-secret" articles had special rights to impose restrictions upon the re-sale of his products.⁶ The acceptance of this doctrine resulted both from an apparent similarity between the conditions surrounding articles manufactured under trade secrets and those manufactured under patents, and from an apparent analogy between contracts relating to the sale of such articles and contracts relating to the sale of inventions, compositions, railroad tickets, trading stamps, and trade secrets themselves.

⁴ *Elliman v. Carrington*, [1901] 2 Ch. D. 275; *Grogan v. Chaffee*, 156 Cal. 611 (1909); *Garst v. Harris*, 177 Mass. 72 (1900); *cf.* *Garst v. Hall & Lyon*, 179 Mass. 588 (1901); *Garst v. Charles*, 187 Mass. 144 (1905); *Clark v. Frank*, 17 Mo. App. 602 (1885); *Walsh v. Dwight*, 40 N. Y. App. Div. 513 (1899); *cf.* *Export Lumber Co. v. South Brooklyn Saw Mill Co.*, 54 N. Y. App. Div. 518 (1900).

⁵ *Horner v. Graves*, 7 Bing. 735 (1831); *Nordenfelt v. Maxim Nordenfelt Co.*, [1894] A. C. 535; *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (1898); *Park & Sons Co. v. Hartman*, 153 Fed. 24 (1907); *Gibbs v. Baltimore Gas Co.*, 130 U. S. 396, 409 (1889).

⁶ *Dr. Miles Med. Co. v. Goldthwaite*, 133 Fed. 794 (1904); *Dr. Miles Med. Co. v. Jayne*, 149 Fed. 838 (1896); *Dr. Miles Med. Co. v. Platt*, *Hartman v. Platt*, *World's Dispensary Med. Assn. v. Platt*, 142 Fed. 606 (1906); *Wells & Richardson Co. v. Abraham*, 146 Fed. 190 (1906), *aff. without report* C. C. A. 2nd Circ.; *Hartman v. Hughes*, U. S. Circ. Ct. Dist. Minn., unreported; *Paris Med. Co. v. Hegeman & Co.*, U. S. Circ. Ct. So. Dist. N. Y., unreported; *Hartman v. Hobart*, U. S. Circ. Ct. Dist. Kan., unreported.

Impetus was given to the approval of this special doctrine by the language of courts in the earlier cases in which this question apparently was involved. These cases include *Garst v. Harris*⁷ and *Elliman v. Carrington*.⁸ Each of these was a suit between the vendor and his vendee involving a single contract, not, so far as the records disclose, embracing a system restricting the entire trade in the commodity. Such contracts might well be valid in regard to any chattel property. Unfortunately, each of the courts apparently deduced from the ability of the vendor, because of his natural monopoly, to withhold entirely his article from commerce, his right, as a condition of giving his article to commerce, to limit his license to sell, in the form of a restriction of the price at which the article might be resold, thus basing the decision upon a right peculiar to the owner of "trade-secret" articles.

Additional confusion resulted from the many opinions in *John D. Park & Sons Co. v. National Wholesale Druggists' Assn.*,⁹ wherein a bare majority of the Court of Appeals of New York agreed in the result, although only a minority agreed in the reasoning by which the result was reached. In this case the complainant sought to enjoin the defendants from carrying on a conspiracy interfering with the complainant's business, because in restraint of trade. The complaint described the articles in question as "patent medicines." It is a matter of common knowledge that few if any so-called "patent medicines" are in fact patented although in the production of all trade secrets are employed. The question having been submitted on demurrer, the Court of Appeals sustained the right of the defendants to combine to maintain prices, because the exclusive right of monopoly granted by the patent laws of the United States included the right to fix prices.¹⁰ The court having thus decided this case upon an erroneous conception of the facts, the public accepted the decision as applying to the actual conditions and, in subsequent litigations in other courts, aided by this apparent precedent, litigants secured numerous decisions upholding the

⁷ 177 Mass. 72 (1900).

⁸ [1901] 2 Ch. D. 275.

⁹ 175 N. Y. 1 (1903).

¹⁰ See *Straus v. American Publishers' Assn.*, 177 N. Y. 473, 477 (1904), where the court expressly bases its decision in the *Park* case on the right of monopoly given by the patent laws.

right to maintain prices as a right peculiar to the employment of trade secrets.

The similarity of conditions surrounding the manufacture of articles under patents and under trade secrets is superficial and consists only in the monopoly of production enjoyed by both manufacturers. Even in this similarity there is the vital difference that the statutory monopoly of the patentee is under the protection of the law, while the natural monopoly of the possessor of a secret exists only as long as the secret is preserved, and is protected by law only against fraudulent discovery or disclosure.¹¹ The consideration for the statutory monopoly is the giving of the full benefit of discovery, after a period of exclusive use, to the general public.¹² The owner of a trade secret gives nothing to the public, the value of his property being dependent upon its secrecy. Hence public policy, as expressed in statutes or decisions, favors the statutory and opposes the natural monopoly. The natural monopoly is in the secret itself and has no relation to the article manufactured by its use when once it is offered as a subject of commerce.¹³ The right and power to refrain from production cannot of itself embrace the right to sell, when produced, upon illegal conditions. Nor, as has been suggested,¹⁴ can such conditions be imposed on the theory that they attach to personal property so as to bind equitably those who take with notice. A condition rightfully imposed on the original vendee cannot bind a sub-purchaser of chattels by operation of notice.¹⁵ It will hardly be contended that conditions

¹¹ *Vulcan Detinning Co. v. American Can Co.*, 67 N. J. Eq. 243 (1904); *Stewart v. Hook*, 118 Ga. 445 (1903); *Westervelt v. Nat. Paper & Supply Co.*, 154 Ind. 673 (1900); *Peabody v. Norfolk*, 98 Mass. 452 (1868); *Chadwick v. Covell*, 151 Mass. 190 (1890); *Tabor v. Hoffman*, 118 N. Y. 30 (1889); *Chain Belt Co. v. Von Spreckelsen*, 117 Wis. 106 (1903); *Park & Sons Co. v. Hartman*, 153 Fed. 24 (1907).

¹² *Grant v. Raymond*, 6 Pet. (U. S.) 218 (1832); *Wheaton & Donaldson v. Peters & Grigg*, 8 Pet. (U. S.) 591 (1834); *Wilson v. Rousseau & Easton*, 4 How. (U. S.) 646 (1846); *Bement v. Nat. Harrow Co.*, 186 U. S. 70 (1901).

¹³ This conclusion necessarily follows from the reasoning upon which the right of a patentee to exercise monopolistic rights over his product is sustained; and so held in the case under discussion and in *Park & Sons Co. v. Hartman*, 153 Fed. 24 (1907). See also *Chadwick v. Covell*, 151 Mass. 190 (1890).

¹⁴ 17 HARV. LAW REV. 415.

¹⁵ *Dr. Miles Med. Co. v. Park & Sons Co.*, 220 U. S. 373; *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339 (1907); *Park & Sons Co. v. Hartman*, 153 Fed. 24 (1907), and cases there cited; *Taddy & Co. v. Sterious & Co.*, [1904] 1 Ch. D. 354 (1903); *McGruther v. Pitcher*, [1904] 2 Ch. D. 306; *Garst v. Hall & Lyon Co.*, 179 Mass. 588 (1901).

illegal as to the original vendees can be legalized as to sub-vendees by the operation of such rule. The statutory monopoly, by the terms of the patent laws, extends to the sale and use of the property created by the use of the invention. The right to impose restrictions upon sales of chattel property manufactured under patent, subsequent to the original sale by the patentee, if such exists,¹⁶ is not an incident to the monopoly of production but is the result of statutory grant.

The right to impose conditions upon the sale or use of inventions, compositions, news or information, railroad tickets, trading stamps, and trade secrets is established.¹⁷ Some courts sustain this right as incidental to the monopoly of the vendor in the property transferred. Because of this reasoning, other courts have yielded to the claims of vendors of articles in whose production trade secrets have been used, basing their decisions upon the existence of an analogous original monopoly. Monopoly of possession cannot, any more than monopoly of production, include the right to part with possession on illegal terms. This monopoly is an accidental similarity and should not be the basis of the determination of the rights of restriction on sales. Articles embodying trade secrets are articles of general commerce in whose unrestricted transfer the public is vitally interested. In this respect they differ essentially from the species of property above enumerated whose common attribute is that none are articles of commerce. The public policy governing their transfer is different from that governing commercial chattels; therefore the rights incident to their sale cannot be determined by rules of commercial law.¹⁸

Inventions, compositions, and trade secrets are but concepts

¹⁶ *Bement v. Nat. Harrow Co.*, 186 U. S. 70 (1901); *Edison Phonograph Co. v. Kaufmann*, 105 Fed. 960 (1901); *Edison Phonograph Co. v. Pike*, 116 Fed. 863 (1902); *Victor Talking Machine Co. v. The Fair*, 123 Fed. 424 (1903). Because of these and numerous additional authorities apparently sustaining the right of a patentee to retain dominion by contract over the re-sale of his articles after parting with all his title except this right, the writer hesitates in expressing his doubt as to the existence of the right of a patentee to impose general price restrictions upon the subsequent commerce in his product when he has sold the same for the purpose of re-sale.

¹⁷ See citations under notes 19, 20, 21, and 22, *post*.

¹⁸ *Maxim Nordenfelt Co. v. Nordenfelt*, [1893] 1 Ch. D. 630; *Fowle v. Park*, 131 U. S. 88 (1888); *Harrison v. Glucose Co.*, 116 Fed. 304 (1902); *Park & Sons Co. v. Hartman*, 153 Fed. 24 (1907); *Meyer v. Estes*, 164 Mass. 457 (1895); *Standard Fire Proofing Co. v. St. Louis Co.*, 177 Mo. 559 (1903); *Hard v. Seeley*, 47 Barb. (N. Y.) 428 (1865); *Tode v. Gross*, 127 N. Y. 480 (1891); and cases cited *post*.

which lose their values as saleable property as soon as given to the public use. The public has no interest in whether the invention or concept, process or formula, is used by the vendor or vendee; it has no right to compel the publication and hence loses no right by respecting the conditions upon which a confidential disclosure is made.¹⁹ Not to respect these conditions would prevent the transfer of this species of property and would result in injury to the public.²⁰ So, too, news and information are vendible only so long as undisclosed or confidentially communicated. A general publication results in the destruction of marketable value. Hence the policy of the law is to prevent a public disclosure by one who has contracted for a restricted use.²¹

Railroad tickets and trading-stamp agreements are in the nature of contracts for personal service and neither can properly become the subject of general commerce.²² Like all contracts personal in their nature, they can be transferred and assigned only with the consent of both contracting parties and only upon the conditions to which the contracting parties assent.

These characteristics so widely differentiate each of these kinds of property from chattel property in whose manufacture a trade secret has been employed as to destroy any analogy of rights based upon the original monopoly of possession. The mere use of a trade secret in production does not change the character of the monopoly of possession of the article produced. The producer of any chattel has, until sale, a monopoly of possession in the article produced by him. It follows that the monopoly of possession, and the rights incident thereto, are not dependent upon the employment of a trade secret, and that the right to maintain restrictions upon future sales must be determined by the rules governing the transfer of chattel property in general.

¹⁹ *Central Transportation Co. v. Pullman Palace Car Co.*, 139 U. S. 24, 53 (1890); *Park & Sons Co. v. Hartman*, 153 Fed. 24, 30 (1907).

²⁰ *Maxim Nordenfelt Co. v. Nordenfelt*, [1893] 1 Ch. D. 630.

²¹ *Exchange Tel. Co. v. Gregory & Co.*, [1896] 1 Q. B. 147; *Board of Trade of City of Chicago v. Christie Grain and Stock Co.*, 198 U. S. 236 (1904); *Nat. Tel. News Co. v. Western Union Tel. Co.*, 119 Fed. 294 (1902); *Dodge Co. v. Construction Information Co.*, 183 Mass. 62 (1903); *Jewelers' Merc. Agency Co. v. Jewelers' Pub. Co.*, 84 Hun (N. Y.) 12 (1895), 155 N. Y. 241 (1898).

²² *L. & N. R. Co. v. Bitterman*, 128 Fed. 176 (1904), 144 Fed. 34 (1906), 207 U. S. 205 (1907); *Sperry & Hutchinson Co. v. Mechanics' Clothing Co.*, 128 Fed. 800 (1904), 135 Fed. 833 (1904); *Same v. Temple*, 137 Fed. 992 (1905); *Park & Sons Co. v. Hartman*, 153 Fed. 24, 31 (1907).

The primary test of what is unlawful at common law, as in restraint of trade, is the effect of the restraint upon public interests.²³ Any classification of permissible restraints must respond to this basic test, and all subordinate bases of such classifications must imply, as a primary premise, that the public interests are not injuriously affected by the permitted acts.

A careful analysis of the numerous authorities upon this subject discloses that the ruling cases respond to the above test.²⁴ There is some slight confusion in terminology — a confusion arising from the paucity of our language rather than from lack of definite thought. Restraints are referred to as “general” and “partial.” The facts to which these terms have been applied show conclusively that “general” is not used as synonymous with “total,” nor does “partial” mean “fractional.” “General” is used whenever the restraint affects the general public interests. “Partial” is used when the restraint affects primarily the particular interest of the individual, without being so extensive as to affect injuriously the general interests of the public. Thus a fractional restraint is “general” if it is of such magnitude as to affect the public; a total restraint is necessarily “general” if it covers any subject of general trade and commerce.

From these premises two broad propositions are to be deduced: first, general restraints of trade are always unlawful;²⁵ and, second, partial restraints of trade are sometimes legal.

Under this second division falls an extensive subordinate classi-

²³ 2 Parsons on Contracts, 7 ed., 887; *Fowle v. Park*, 131 U. S. 88 (1889); *Finck v. Schneider Granite Co.*, 187 Mo. 244 (1904); *Charleston, etc. Co. v. Kanawha Co.*, 58 W. Va. 22 (1905).

²⁴ *Central Transportation Co. v. Pullman Palace Car Co.*, 139 U. S. 24, 53 (1890); *Cummings v. Union Blue Stone Co.*, 164 N. Y. 401, 404 (1900); *Vickery v. Welch*, 19 Pick. (Mass.) 523 (1837).

²⁵ “If a man be possessed of a horse or any other chattel, real or personal, and gives his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him, so that he hath no possibility of reverter; and it is against trade and traffic and bargaining and contracting between man and man.” Coke on Littleton, Sec. 360. *In re Greene*, 52 Fed. 104, 116 (1892); *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (1898), aff. 175 U. S. 211 (1899); *Swift & Co. v. United States*, 196 U. S. 375 (1905); *Pacific Factor Co. v. Adler*, 90 Cal. 110 (1891); *Santa Clara, etc. Co. v. Hayes*, 76 Cal. 387 (1888); *Chicago, etc. Coal Co. v. People*, 214 Ill. 421 (1905); *Cohen v. Berlin & Jones Envelope Co.*, 166 N. Y. 292 (1901); *State v. Standard Oil Co.*, 49 Oh. St. 137 (1892); *Texas Standard Oil Co. v. Adour*, 83 Tex. 650 (1892).

fication, because, although the public interests, in the commercial sense, may not be directly affected by the restraint in question, still the public is interested in preventing the individual from restraining himself in the free exercise of his energies beyond what the circumstances of his case may reasonably demand. Hence, when once it has been determined that the restraint is not of sufficient breadth to affect injuriously the commercial-economic interests of the public, *i. e.*, that it is partial, the further question must be determined whether the restraint is of such character as to affect injuriously the individual-economic public interests, in restraining an individual more than the circumstances of the transaction make reasonably necessary.²⁶

The rule is established that a restraint of trade to be permissible must be ancillary to the main object of the contract by which it is imposed.²⁷ When the restraint is the principal object of the contract it cannot be reasonably necessary for the protection of the covenantee, for the protection contemplated by the rule is to safeguard him in the enjoyment of the benefits attainable under the principal contract, or to protect him against an improper use of its benefits by the covenantor.

Applying the above principles to the restraints involved in a system of contracts to fix prices for all the sales of a distinct article of commerce, it would appear that they are illegal because general and because, even if partial, unreasonable.

It would be difficult to conceive of a restraint of trade more complete than one seeking to fix the prices on all sales from the manufacturer through the intermediate dealers to the consumer. The manufacturer restrains himself by agreeing to sell at only one price and only to contracting dealers. All competition between wholesale dealers is destroyed by their agreement to sell only at a minimum price and only to authorized purchasers. The retail dealer likewise is removed from the possibility of competition by his agreement to sell at fixed prices and to none other than the consumer. No discoverable room for competition is left from the manufacturer to the consumer. The merchandise, the subsequent trade in which the manufacturer is thus attempting to control,

²⁶ *Gibbs v. Baltimore Gas Co.*, 130 U. S. 409 (1888); *Nordenfelt v. Maxim Nordenfelt Co.*, [1894] A. C. 535, 567.

²⁷ *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 282 (1898).

is a separate and distinct article of trade. Being manufactured under secret processes and formulæ which the single producer alone has power to use, no other manufacturer can make it. There are of course other preparations used for the same purposes, but the articles controlled are, from their very nature, all the articles of their precise kind in commerce. The attempted restraint is therefore complete. Even though the public might not have much general interest in the trade in the articles in question, when the public has some interest and the restraint is total, the unimportance of the trade does not prevent the restraint from being general.²⁸

An exhaustive classification of permissible restraints of trade is found in the opinion of Judge Taft in *United States v. Addyston Pipe & Steel Co.*²⁹ If in any of the five classes there enumerated, the right of the seller of chattels to fix prices of re-sale could fall only under the fourth, as an agreement "by the buyer of property not to use the same in competition with the business retained by the seller." Assuming that a general contract system fixing prices on all sales and re-sales is not illegal as in general restraint of trade, and that the covenants are ancillary to a principal contract of sale, under the foregoing test, the question still remains as to whether they are necessary for the protection of the business retained by the seller. The manufacturer of chattels who does not sell the same to the consumer is not in competition with the dealer to whom he sells for such distribution. Regardless of whether or not his immediate vendees secure a satisfactory price in their sales, the manufacturer, because of his monopoly of production and initial sale, secures such price as he may desire. Consequently such contracts cannot fall within Judge Taft's fourth class of permitted partial restraints.

It is true that the original vendor of chattels may be limited in his sales by the fact that his vendees are subjected to such competition as to prevent them from making a reasonable profit in the re-sale of his goods, but this is a disadvantage incidental to the distribution of chattels through intermediaries to the consumer. The manufacturer has no more right to overcome this disadvantage by identical contracts with all intermediate vendors than such

²⁸ *Montague & Co. v. Lowry*, 193 U. S. 38 (1904).

²⁹ 85 Fed. 271, 282 (1898).

vendors would have by agreement with each other. Such agreements between dealers have uniformly been held contrary to the public interest.³⁰

In conclusion it might be suggested that public policy, apart from that involved in the technical questions of restraint of trade, should oppose the enforcement of such systems of fixing prices. The inducement now offered for the disclosure of beneficial discoveries, to the ultimate advantage of the general public, includes a monopoly of manufacture, use, and sale.³¹ To sanction and establish any part of these as rights of the owners of general chattel property is to reduce the consideration for the disclosure of inventions.

A second consideration adverse to the establishing of such right is the means it would afford to the large producers, or so-called "trusts," of doing what the public is now using every means to prevent their doing. The ultimate object of all producers is to enlarge the profit which they are to receive for their productions. If a larger profit could be insured to the intermediate dealer he would be willing to pay an enhanced price to the manufacturer. To legalize the system of fixing prices would furnish the "trusts" the most simple and least expensive method of accomplishing this end. The establishment of such right would render nugatory the efforts of a quarter of a century to enforce the public policy declared in all the anti-trust statutes.

William J. Shroder.

CINCINNATI, OHIO.

³⁰ *People v. Sheldon*, 139 N. Y. 251 (1893); *People v. Milk Exchange*, 145 N. Y. 267 (1895); *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (1898), aff. 175 U. S. 211 (1899); *Montague & Co. v. Lowry*, 193 U. S. 38 (1904).

³¹ *Bement v. National Harrow Co.*, 186 U. S. 70 (1902); *Heaton, etc. Co. v. Eureka Specialty Co.*, 77 Fed. 288 (1896); *Dickerson v. Tinling*, 84 Fed. 192 (1897); *Edison Phonograph Co. v. Kaufmann*, 105 Fed. 960 (1901); *Edison Phonograph Co. v. Pike*, 116 Fed. 863 (1902); *Victor Talking Machine Co. v. The Fair*, 123 Fed. 424 (1903).

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MR. AUSTIN WAKEMAN SCOTT, Assistant Professor of Law, has accepted the position of Dean of the College of Law of the State University of Iowa. When it is recalled that Professor Beale was similarly absent from this Law School, as Dean of the Law School of the University of Chicago, for two years from 1902 until 1904, the hope may well be entertained that the absence of Assistant Professor Scott will be but temporary.

THE LAW SCHOOL. — Several changes in the curriculum may be noted. Chief among these is the abolition of practically all mid-year examinations. Professor Wambaugh's course in Insurance has been made a full-year course of two hours a week; the course in Public Service Companies will be given as a whole by Professor Wyman, instead of being divided, as formerly, into Carriers under Professor Beale, and Public Service Companies under Professor Wyman; the courses in Equity III and in Quasi-Contracts have been joined so as to form one full course. Thus the only half-year courses remaining in the regular three-year curriculum are Damages, Bankruptcy, which has been made a third-year subject, Persons, and Municipal Corporations; and of these the two first named are the only ones in which the examinations fall at mid-year.

In the fourth year, half courses are still the rule. In that year, Professor Pound will give new courses in the Law of Mining and Irrigation and in the Theory of Law and Legislation. The course in Admiralty has been transferred to the fourth year.

Owing to the absence of Assistant Professor Scott, some redistribution of courses has been necessary. Trusts will be given by Professor Pound,

while Equity III, given by him last year, will be taught by Mr. Dutch. The course on Pleading will be given by Mr. Warren Abner Seavey, A.B., LL.B., 1904, newly appointed Lecturer on Pleading, and the course on Massachusetts Practice by Mr. John Gorham Palfrey, A.B., LL.B., 1899, a former editor of this Review, who has been appointed Lecturer on Massachusetts Practice.

There has been a considerable increase in the requirements of the Law School. The required number of hours a week for first year men has been raised from twelve to thirteen, the courses in Criminal Law and in Pleading having each been made full courses of two hours a week throughout the year. Twelve hours a week, instead of ten, is now the requirement in the second year. In addition, it is required that the general average grade of second year students be five per cent higher than the passing mark in the individual courses.

THE AMES COMPETITION. — The year marks the establishment, out of the fund given by Mrs. James Barr Ames, at the request of her husband, of two prizes of \$200 and \$100, to be given to the winners of a competition between the law clubs in the argument of moot cases. The competition will be in the form of an elimination tournament, and will be open to all second-year clubs of eight members which meet certain requirements. In the competitions in any given round, each club will be represented by two counsel. No representative of any club may argue more than once until at least six men of that club have argued; but after six men have argued no further restriction is imposed.

THE BOARD OF STUDENT ADVISERS. — The scope of the work of the Board of Student Advisers, appointed by the Faculty, has been somewhat extended. The Board is to have supervision of the Ames Competition, and, in addition, each adviser will be assigned a certain number of the law clubs over the work of which he will have general supervision; he will also sit on several of the cases argued in these clubs. The members of the Board will be in the reading room of Langdell Hall during certain hours of the day to assist all members of the Law School in the intelligent use of the law library. The members of the Board for the coming year are James B. Grant, Jr., Chairman, Lawrence G. Bennett, John G. Buchanan, William M. Evarts, Charles V. Graham, Max Lowenthal, Stuart C. Rand, and J. Robert Szold.

THE STANDARD OIL AND TOBACCO CASES AND PRIOR DECISIONS OF THE SUPREME COURT UNDER THE SHERMAN ACT. — Seven years ago, only a five to four majority of the judges of the Supreme Court prevented a holding that the Sherman Anti-Trust Act is powerless to deal with restraint of trade in the form of a corporation.¹ The two

¹ See *Northern Securities Co. v. United States*, 193 U. S. 197.

great recent cases under the Act dispel all former doubts on that subject. In dissolving the Standard Oil Company and the American Tobacco Company, the court held that restraint of trade as a condition is illegal, irrespective of the form which it assumes, or the nature of the transactions which produce it. *Standard Oil Co. v. United States*, 221 U. S. 1; *United States v. American Tobacco Co.*, 221 U. S. 106.

But these decisions also mark an epoch in anti-trust law in construing the words "restraint of trade" in the Act in their common-law significance, and so as embracing only "undue" restraints. The court for the first time lays down an intelligible test of illegality. In so doing the court departs in no wise from its prior decisions, and makes no change in the law. It is true that it was often stated, as a result of generalization from some of the language used in certain cases,² that the Supreme Court had construed the Act to embrace every restriction of competition, whether or not reasonable, and whether or not affecting the right of strangers to the transaction to compete. But this statement of the law was justified by no decision of the court and was by no means universally accepted.³ The propositions of law bearing on this question which are embodied in the decisions of the court prior to the principal cases are comparatively few. One class of cases held combinations between railroads to fix rates illegal.⁴ Another class of cases held combinations of manufacturers or dealers to control prices by securing a monopoly illegal.⁵ But the facts of the cases in the second class showed a very apparent attempt on the part of the defendants to suppress competition by outsiders to the agreement, and hence they furnish no basis for the supposed "rule." No more do those cases which deal with combinations the primary purpose and effect of which was to restrain the commerce of the public.⁶ Indeed the only cases which are seriously regarded as giving color to the statement that all restriction of competition was illegal are the railroad cases. But railroads are public service companies, which, on account of their natural monopoly and their public nature, are governed by rules inapplicable to ordinary men. Even at common law, they were subject to a visitatorial power of regulation in the state enforceable through the courts of chancery.⁷ And language, distinguishing public service companies from ordinary corporations, is not lacking in cases in the Supreme Court.⁸ Combinations of railroads to fix prices were considered so dangerous as to be *per se* unlawful, and the decision in these cases was simply that the fact that the rates fixed were reasonable would not render them lawful.⁹

² See *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 327; *United States v. Joint Traffic Association*, 171 U. S. 505, 577; *Northern Securities Co. v. United States*, 193 U. S. 197, 328, 331.

³ See, for example, an article by Victor Morawetz in 22 HARV. L. REV. 492.

⁴ *United States v. Trans-Missouri Freight Association*, *supra*; *United States v. Joint Traffic Association*, *supra*; *Northern Securities Co. v. United States*, *supra*.

⁵ *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211; *Montague & Co. v. Lowry*, 193 U. S. 38; *Swift & Co. v. United States*, 196 U. S. 375; *Continental Wall Paper Co. v. Voight*, 212 U. S. 227.

⁶ Such a case is *Loewe v. Lawlor*, 208 U. S. 274.

⁷ *Attorney-General v. Railway Companies*, 35 Wis. 425.

⁸ See *Gibbs v. Consolidated Gas Co. of Baltimore*, 130 U. S. 396, 408.

⁹ See *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 331; *United States v. Joint Traffic Association*, 171 U. S. 505, 576. It may well be doubted

Indeed, far from being justified by the cases, the supposed rule that any restriction of competition is illegal was inconsistent with at least one case which held a contract by a seller of a business not to compete with the buyer legal as simply incidental to the sale of the good-will.¹⁰ It is also inconsistent with the language of Peckham, J., himself in these same railroad cases in which he insists that the Act must be given a reasonable construction and not held to make illegal ordinary business transactions.¹¹ The supposed rule was at best embodied in a *dictum*, never lived up to by the court, and deprived of all force even as a *dictum* when, by its repudiation by Brewer, J., in his concurring opinion in the Northern Securities case, it became the *dictum* of only a minority of the court.¹²

Thus the court before the principal cases were decided recognized that the general wording of the Act necessitated the judicial framing of some standard of illegality. The principal cases recognize the only standard fairly to be inferred from the words of the Act, namely, the standard imposed by the common law at the time of its adoption.¹³ This demands that a restraint be reasonable in its relation to the necessities of the parties to some lawful transaction, and in its relation to the public.¹⁴ It is certainly unreasonable in its relation to the public when it interferes with the right of strangers to the combination to compete.¹⁵ Thus this construction strikes at the evils of combination without infringing on the constitutional guaranty of freedom of contract. How far a combination not involving the universally recognized classes of public service companies may be unreasonable merely on account of its size must be regarded as still unsettled by direct decision. On principle it would seem that this must depend largely on the nature of the business in each particular case. Where the business is such that competition is still possible, it would seem that the right of outsiders to compete is not interfered with unless resort is had to unfair methods to suppress competitors who will not join the combination; for only by such methods may an effective monopoly be maintained. But in many businesses, because of the cost of plant necessary to conduct them, or other considerations, a combination of great size may come to be a virtual monopoly,¹⁶ even though it has attained its position simply by a process of legitimate business development. As such a combination would be as effective an obstacle to free competition as if it had used unfair methods to throttle competition, it may well be questioned whether its mere size would not render it illegal.

whether the use of the word "reasonable" in these cases had any reference to the nature of the combination, apart from the reasonableness of the rates that it fixed.

¹⁰ *Cincinnati, etc. Packet Co. v. Bay*, 200 U. S. 179. It was said here that this restraint was not "direct." Exactly what was meant by "direct" seems uncertain.

¹¹ See *United States v. Joint Traffic Association*, 171 U. S. 505, 566, 567.

¹² See *Northern Securities Co. v. United States*, 193 U. S. 197, 361. Even if the present construction of the Act be regarded as merely *dictum*, because the defendants in the principal cases were subject to dissolution under any construction, it is a *dictum* subscribed to by eight out of nine of the judges.

¹³ See *Standard Oil Co. v. United States*, 221 U. S. 1, 60.

¹⁴ *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, aff. 175 U. S. 211.

¹⁵ *Addyston Pipe & Steel Co. v. United States*, *supra*; *Montague & Co. v. Lowry*, *supra*; *Swift & Co. v. United States*, *supra*.

¹⁶ See 1 WYMAN, PUBLIC SERVICE CORPORATIONS, §§ 120 et seq.

ATTACHMENT OF STOCK CERTIFICATES. — A recent Rhode Island case raises the question whether the certificates of stock in a foreign corporation, that are owned by a non-resident, but bailed to a third party within the state, can be reached by attachment. *Maertens v. Scott*, 80 Atl. 369 (R. I.). The court held that as the certificates are not the stock itself and as the stock lies outside the jurisdiction the certificates can neither be attached nor garnished. An analogous question has been presented to the New York¹ and Minnesota² courts, differing, however, from the principal case in that the certificates were pledged as collateral security instead of being merely bailed. These courts held that the non-resident debtor's interest could be garnished. To show that all three cases are right and why they are distinguishable requires more than an examination of the various garnishment statutes. It requires an analysis of the very nature of stocks and stock-certificates.

"Stock" has been defined as "the sum of all the rights and duties of a stockholder."³ On theory, the certificates are the tangible indicia of title to these intangible rights. In fact, they represent the stock to a certain degree. But it is the presence of the duties, as well as the rights, in the stockholder that prevents the certificates from ever completely representing the stock in a way analogous to a bill of lading. Nor are the certificates negotiable instruments, for they are not demands for money.⁴ Yet they are, in practice, more than mere title deeds, for the corporation may refuse to transfer the stock upon its books without their surrender.⁵ It is this quality that has given them a quasi-negotiable character. Thus the courts have held that they are taxable,⁶ subject to larceny,⁷ can be administered by an executor in the jurisdiction in which they are found,⁸ and that they pass to a *bonâ fide* purchaser free from equities. This last result has been reached by the decision that, by endorsing them with a blank power of attorney, their owner becomes estopped to deny the transfer of the stock they represent.⁹ They have accordingly come largely to be used as collateral security for the payment of loans. As to what is the legal effect of such a transfer the courts do not agree. But whether it passes the legal title as in the case of negotiable instruments, or whether it merely passes an equitable interest with a power of sale, secured by an irrevocable power of attorney and the custody of the certificates, it is certain that the pledgee acquires something of value, which, under certain circumstances, he may lawfully sell, and with the proceeds reimburse himself for his loan. The pledgor, of course, has a right to any surplus resulting from this sale. Now the *situs* of this right is with the pledgee¹⁰ and it was against this right that the creditors of the pledgors went in the New York and Minnesota cases. This right, analogous to an equity of redemption in the stock, was cre-

¹ *Simpson v. Jersey City Contracting Co.*, 165 N. Y. 193.

² *Puget Sound National Bank v. Mather*, 60 Minn. 362.

³ See LOWELL, TRANSFER OF STOCK, § 4.

⁴ See COOK, CORPORATIONS, § 480 *et seq.*

⁵ See LOUGH, CORPORATION FINANCE, 65.

⁶ See *Re Whiting*, 150 N. Y. 27.

⁷ See *McAllister v. Kuhn*, 96 U. S. 87.

⁸ *Stern v. The Queen*, [1896] 1 Q. B. 211.

⁹ *McNeil v. Tenth National Bank*, 46 N. Y. 325.

¹⁰ 11 HARV. L. REV. 108-112.

ated within the State at the time the loan was made. The presence of the certificates was necessary to make it of value, but they were not the right itself. And so the principal case is clearly sound, for there no rights were created within the state in favor of the non-resident bailor. He still had the legal and equitable title to the stock. The bare certificates were not attachable, for they could not have been sold on execution because the sheriff could not get or give title to the corresponding stock. This basic distinction between a bailment and a pledge of stock has not, however, always been clearly recognized in the cases.¹¹

JUSTIFIABLE RELIANCE ON SELLER AS BASIS FOR IMPLIED WARRANTY OF QUALITY. — The law of implied warranty in sales is comparatively modern. In the old cases, if the buyer did not himself require an express warranty of quality, the law implied none.¹ Now, however, it is well settled that in some cases aside from any express stipulations of the parties a seller is held to warrant at least the merchantability of his goods.² The basis of this obligation is the justifiable reliance of the buyer upon the seller's superior knowledge and greater judgment in the sale.³ What will justify the buyer's reliance is essentially a question of fact.⁴ In determining this question, all the circumstances of the sale should be considered. But the courts tend to formulate fixed rules to govern given states of fact.⁵ Thus some American courts distinguish sharply between sales by a manufacturer, and sales by a dealer,⁶ crystallizing into a rule the probability that a manufacturer knows more about his products than a dealer.

The result of the tendency to lay down fixed rules, rather than to view all the facts broadly to determine when a warranty arises by implication, is well illustrated by the cases involving implied warranties of fitness for a particular purpose. That a product is fit for the general purpose of its manufacture is but another way of saying that it is merchantable.⁷ But under certain circumstances a warranty will be implied not only that articles are merchantable but that they are fit for a particular purpose.⁸ In a recent New York case, the plaintiff, a manufac-

¹¹ Winslow v. Fletcher, 53 Conn. 390. Based on the interpretation of a local statute, the decision of this case is probably right, but the language of the court is too broad and fails to make the distinction pointed out in this note.

¹ Barr v. Gibson, 3 M. & W. 390; Parkinson v. Lee, 2 East 314; Gossler v. Eagle Sugar Refinery, 103 Mass. 331.

² Jones v. Just, L. R. 3 Q. B. 197.

³ See Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 116; Omaha Coal, Coke & Lime Co. v. Fay, 37 Neb. 68, 75.

⁴ See Preist v. Last, [1903] 2 K. B. 148, 154; WILLISTON ON SALES, §§ 231, 236.

⁵ Stanford v. National Drill & Mfg. Co., 114 Pac. 734 (Okl.); Obenchain & Boyer v. Incorporated Town of Roff, 116 Pac. 782 (Okl.). The cases cited are two recent cases which give a decision after a general statement of the law without any discussion of the particular facts involved.

⁶ See 16 HARV. L. REV. 590. A number of authorities for and against this distinction are collected in WILLISTON ON SALES, §§ 232, 233.

⁷ Professor Williston illustrates this principle by saying that the general purpose of a reaping machine is to reap. But if the machine could not reap, it would not be even merchantable. See WILLISTON ON SALES, § 235.

⁸ Kellogg Bridge Co. v. Hamilton, *supra*; Bierman v. City Mills Co., 151 N. Y. 482.

turer, sold the defendant some cloth, which the plaintiff knew was to be used in making clothes. Upon examination the cloth proved to be unfit for that purpose, and in a suit for the balance of the price it was held, that there was an implied warranty of the cloth's availability for the intended purpose. *Rhodesia Mfg. Co. v. Tombacher*, 129 N. Y. Supp. 420 (Sup. Ct., App. Term). It is usually stated that where a manufacturer contracts to supply an article which he manufactures to be applied to a particular purpose so that the buyer necessarily trusts to his judgment, the law implies an undertaking on his part that the article is reasonably suited to the known purpose; but where a known, described, and definite article is ordered, although it is stated to be required for a particular purpose, if the specified article be supplied, there is no warranty that it shall answer the particular purpose intended.⁹ Under this statement, extreme cases can be decided very easily, but there is a middle ground which it does not cover. In the law of express warranty, in order that a buyer may hold his seller, it is not necessary that he shall have relied exclusively on the warranty in making the purchase.¹⁰ Likewise, in the law of implied warranty, the buyer need not have relied solely on the judgment of the seller to claim the advantage of an implied warranty.¹¹ It is in the decision of a close case, where the buyer in part selects his own article, yet at the same time relies upon the seller's greater knowledge, that the rule, as ordinarily stated, falls short of being an accurate test. That a just result is oftentimes reached, nevertheless, by the American courts is evidenced by the decision of the principal case. But it is submitted that, to weigh a close question in the law of implied warranty accurately, the facts themselves must be balanced, and all rules or presumptions of fact must be laid aside.¹²

NATURE OF RIGHT OF LANDOWNER IN UNDERLYING OIL AND GAS. — The limited nature of property rights in fluid substances occupying underground areas is well illustrated by cases dealing with petroleum and natural gas. The problem is to give each landowner the fullest possible enjoyment of what lies within his territory, and yet to make him regard the rights of others in the common reservoir. It was early decided that oil and gas are minerals forming part of the realty,¹ and are assignable as such,² but when severed they become personalty and may be sued for in trover and replevin.³ The true extent of the landowner's rights in them was, however, long sought through imperfect analogies. "Their fugitive and wandering existence" caused them to

⁹ The above statement is substantially a quotation from the opinion of Fuller, C. J., in *Seitz v. Brewer's Refrigerating Machine Co.*, 141 U. S. 510, 518, 519.

¹⁰ See *Chicago Tel. Supply Co. v. Marne & Elkhorn Tel. Co.*, 134 Ia. 252, 258.

¹¹ Cf. *West Michigan Furniture Co. v. Diamond Glue Co.*, 127 Mich. 651; *Preist v. Last*, *supra*.

¹² For a general discussion of the subject of this note and a collection of authorities, see WILLISTON ON SALES, §§ 228-236.

¹ *Williamson v. Jones*, 43 W. Va. 562.

² *Murray v. Allred*, 100 Tenn. 100.

³ See *Kelley v. Ohio Oil Co.*, 57 Oh. St. 317, 328; *Hail v. Reed*, 15 B. Mon. (Ky.) 479.

be called minerals *feræ naturæ*,⁴ and to be compared to wild game, but that analogy fails as a test of property rights, because while the public in general has a right to reduce wild game to possession, only those owning the surface above the deposits can bore for oil and gas.⁵ And analogies drawn from the rules governing percolating water fail because that is regarded as being evenly distributed so that every surface owner is allowed to interfere with its flow regardless of the effect on his neighbors.⁶

A recent decision of the Supreme Court of the United States recognizes the true nature of the right: that the surface owner has not really a property right in the underlying oil and gas, but only a right to reduce it to possession. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61. This case holds that a statute forbidding the waste of water drawn from artesian wells in order to collect the carbonic acid gas contained therein does not deprive the surface owners of property without due process of law. The decision is rested largely upon the authority of a previous decision by the same court sustaining the constitutionality of a statute that forbade the wasting of natural gas as a process of pumping the oil with which it was mixed.⁷ This view reaches the conclusion toward which the authorities have tended. For it has been held that oil and gas are not in the landowner's possession until he has perfected a means of taking them from the ground,⁸ and that in the absence of statute his neighbors may draw them all from under his land,⁹ so that unless he taps the common reservoir for himself he may lose his potential rights in its contents.¹⁰ By thus regarding the subterranean deposit as a common supply belonging potentially to all the surface owners, but ultimately and actually to such of them as shall draw it off, the courts have upheld the state's right to regulate the means of taking possession of it,¹¹ and to forbid its waste.¹² And in one instance without the aid of a statute, it has been held, that a man can only draw it off in a reasonable manner with due regard for the rights of other potential owners.¹³ So in the principal case the regulation of the exercise of this right of potential ownership is not a taking of property without due process, but rather a safeguarding of the rights which all the adjoining landowners have in the common supply.

NATURE OF QUASI-CONTRACTUAL RELIEF APPLIED TO VOLUNTARY PAYMENTS. — That quasi-contractual relief is equitable in its nature

⁴ See *Westmoreland & Cambria Natural Gas Co. v. DeWitt*, 130 Pa. St. 235, 249.

⁵ See *Ohio Oil Co. v. Indiana* (No. 1), 177 U. S. 190, 209.

⁶ *Chasemore v. Richards*, 7 H. L. Cas. 349; *New Albany & Salem R. Co. v. Peterson*, 14 Ind. 112. A few cases do hold that the offender must act reasonably. *Swett v. Cutts*, 50 N. H. 439.

⁷ *Ohio Oil Co. v. Indiana* (No. 1), *supra*.

⁸ *Westmoreland & Cambria Natural Gas Co. v. DeWitt*, *supra*.

⁹ *Hague v. Wheeler*, 157 Pa. St. 324.

¹⁰ See *Jones v. Forest Oil Co.*, 194 Pa. St. 379, 383.

¹¹ *Jamieson v. Indiana Natural Gas & Oil Co.*, 128 Ind. 555.

¹² *Townsend v. State*, 147 Ind. 625.

¹³ *Manufacturers Gas & Oil Co. v. Indiana Natural Gas & Oil Co.*, 155 Ind. 461.

has been uniformly recognized by the courts.¹ Yet it has become almost universal to lay down certain arbitrary tests governing such relief. The most striking example is the rule that voluntary payments cannot be recovered.² It is to be regretted that such an expression ever came to be frequently applied, for not only are the courts hopelessly confused as to what is a voluntary payment,³ but only too often has the use of the words as a solving phrase obscured the true ground of the relief given.⁴

In a recent English case the highway authorities of a parish made some repairs on a road which the defendants were under a statutory duty to make but refused to undertake. It was held that the authorities were volunteers in making the repairs and could not recover their expense. *Macclesfield Corporation v. The Great Central Ry.*, [1911] 2 K. B. 528.

The cases which have recognized the true equitable nature of the problem seem to have arrived at the result that, once the primary liability is fixed on the defendant, it is only just that he should pay one who has relieved him of it,⁵ unless the facts show that the payment was made as a gift⁶ or was unreasonable, officious.⁷ Thus recovery may be had for payments made under compulsion of any kind even though it does not amount to duress.⁸ Acting in pursuance of a strong moral duty will be enough to warrant recovery.⁹ Doing an act which is for the public benefit or in the furtherance of which the public has an interest will be sufficient reason for recovery even though the motive is also to benefit the actor.¹⁰ Where a finder preserves lost property, he may recover from the owner for services so rendered.¹¹ On the same principle a purchaser at an execution sale may recover from the debtor if the latter had

¹ *Moses v. Macferlan*, 2 Burr. 1005; *Western Assurance Co. v. Towle*, 65 Wis. 247.

² Recovery is denied on this ground very frequently. See *Fellows v. School District*, 39 Me. 559; *Wood v. City of New York*, 25 N. Y. App. Div. 577. The same tendency is shown in the rule that there may be no recovery for mistake of law. *Bilbie v. Lumley*, 2 East 469. Another example is the rule requiring a plaintiff who has waived a tort to abide by his choice at all events. *Terry v. Munger*, 121 N. Y. 161.

³ Some cases have required an element of compulsion to prevent the payment from being voluntary. *Illinois Glass Co. v. Chicago Tel. Co.*, 234 Ill. 535. Others require that the plaintiff have acted in furtherance of a duty either legal or equitable. *Earle v. Coburn*, 130 Mass. 596. The only thing that seems settled is that payments are not necessarily voluntary in which the actor's mind is active, or which are not made under duress, or undue influence. *Exall v. Partridge*, 8 T. R. 308; *Patterson v. Patterson*, 59 N. Y. 574.

⁴ *Matheny v. Chester*, 141 Ky. 790. Thus recovery has been denied of payments illegally charged for a permit to build vaults under a city street. *Wood v. City of New York*, *supra*.

⁵ *Moses v. Macferlan*, *supra*.

⁶ *Osborn v. The Governors of Guys Hospital*, 2 Str. 728; *Doyle v. The Rector, Churchwarden and Vestrymen of Trinity Church*, 133 N. Y. 372.

⁷ KEENER, QUASI-CONTRACTS, 388.

⁸ *Exall v. Partridge*, *supra*. Payment in pursuance of an illegal demand of taxes may be recovered. *Preston v. City of Boston*, 12 Pick. (Mass.) 7.

⁹ Recovery is allowed a plaintiff from the deceased's estate for burial of a corpse. *Ambrose v. Kerrison*, 10 C. B. 776. A plaintiff who supports one in need may recover from the person chargeable in the first instance. *Forsyth v. Ganson*, 5 Wend. (N. Y.) 558.

¹⁰ *Nicholson v. Chapman*, 2 H. Bl. 254. Cf. *Great Northern Ry. Co. v. Swaffield*, L. R. 9 Exch. 132.

¹¹ *Nicholson v. Chapman*, *supra*; *Chase v. Corcoran*, 106 Mass. 286.

no title to the goods sold.¹² But where both the effect and motive serve only a personal desire, such as to save one's credit when the payment could not have been demanded, recovery has been denied.¹³

Though there is no actual compulsion in the principal case, yet it is submitted that the services were not so unreasonable as to justify the denial of a recovery. The repair of streets is as much to be encouraged, as a public matter, as the preservation of lost property. Even though the repairs were made to protect the plaintiffs' position as highway authorities, yet that should be no bar to recovery, since their position makes it reasonable for them to act. Since they represent the voters in the repair of streets, it is as reasonable for them to act as it would be for the voters themselves. And it would be difficult to say that the voters of a district were officious in repairing their roads. In truth the highway authorities could not avoid making the repairs without prejudicing themselves and repudiating their duty toward the voters, which exists even though legal liability to repair is removed. It seems, therefore, that an arbitrary use of the phrase "voluntary payment" has led the court to deny relief in a case where in equity and good conscience the defendant should pay.

THE DATE TO WHICH THE TITLE OF THE TRUSTEE IN BANKRUPTCY RELATES BACK. — Under the Bankruptcy Act of 1867 the title of the assignee to the estate of the bankrupt related "back to the commencement of the proceedings in bankruptcy."¹ It was held that under this provision the assignee could sue to recover goods transferred by the bankrupt after the filing of the petition but before the adjudication.² The present act provides that "the trustee of the estate of a bankrupt, upon his appointment and qualification, . . . shall . . . be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt." But among the classes of the bankrupt's property so passing to the trustee the act mentions "(5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."³ An attempt has been made to reconcile these different statements as to the date of relation back of the trustee's title by saying that the words "prior to the filing of the petition" refer to what property passes to the trustee, the words "as of the date he was adjudged a bankrupt" to the time when the property passes.⁴ But it is plain that the effect of either phrase must be merely to determine what property passes to the trustee, since the trustee cannot really take title till his appointment and qualification.⁵

¹² *McGhie v. Ellis*, 4 Litt. (Ky.) 244; *Preston v. Harrison*, 9 Ind. 1; *Reed v. Crowthait*, 6 Ia. 219. These decisions are in equity. No case seems to have arisen at law, but Professor Keener believes the same result should be achieved. KEENER, QUASI-CONTRACTS, 396.

¹³ *Harvey v. Girard National Bank*, 119 Pa. St. 212.

¹ U. S. REV. STAT., 1878, § 5044.

² *Bank v. Sherman*, 101 U. S. 403.

³ BANKRUPTCY ACT OF 1898, § 70a.

⁴ See *In re Pease*, 4 Am. B. R. 578, 581; COLLIER, BANKRUPTCY, 8 ed., 807.

⁵ *Fuller v. New York Fire Ins. Co.*, 184 Mass. 12; *Rand v. Iowa Central Ry. Co.*,

It would seem, since no reference is made to the date of the filing of the petition in connection with the other classes of property passing to the trustee, that the reference to it in connection with the fifth class was due to inadvertence and that Congress really intended to make the adjudication the date of cleavage. *Dicta* may be found which seem to interpret the statute as having this effect.⁶ By the decided weight of authority, however, it is interpreted as making the filing of the petition the date of cleavage. Thus a leading case holds that the bankrupt need account to the trustee only for moneys received from goods sold from the stock as it existed at the date of filing of the petition, not from other goods sold before the adjudication.⁷ Property transferable by the bankrupt at the date of filing passes to the trustee.⁸ But property acquired by him between that date and the adjudication does not.⁹ And therefore the latter need not be included in the bankrupt's schedules.¹⁰ This construction of the statute has been used as an argument to give jurisdiction to the court in which a petition is first filed as against the court making the first adjudication.¹¹ It has been adopted as the basis of an inference that all provable claims must exist at the time when the petition is filed.¹² And, finally, it has been invoked to permit recovery by the trustee from creditors of money obtained by the attachment of the bankrupt's property between the filing of the petition and the adjudication.¹³

In a recent case, a bank, having on deposit moneys belonging to one against whom a petition in bankruptcy had been filed, without notice of the filing, paid out money on checks delivered by the depositor to the payee previous to the filing of the petition. It was held that the bank could not be required, on summary order, to turn over to the trustee in bankruptcy the amount so paid out. *Matter of Zotti*, 26 Am. B. R. 234 (C. C. A., Second Circ.). This case proceeds on the theory, opposite to that indicated above, that the trustee cannot recover on the ground that his title relates back to a period prior to the date of adjudication. It finds support in a decision allowing a lien of the bankrupt's property to perfect his title after the petition has been filed.¹⁴ If it is to be reconciled with the current of authority on other than procedural grounds, it must be by a loose construction of the statute which will make the date of filing of the petition the test of the bankrupt's title for most purposes, but will protect "honest transactions" occurring between that date and the date of adjudication.¹⁵ A similar distinction is specifically provided for by the English statute.¹⁶

186 N. Y. 58; *Gordon v. Mechanics' & Traders' Ins. Co.*, 120 La. Ann. 441. Cf. *Rand v. Sage*, 94 Minn. 344.

⁶ See *Hiscock v. Varick Bank of New York*, 206 U. S. 28, 40; *Keegan v. King*, 96 Fed. 758, 760; *In re Peacock*, 178 Fed. 851, 855; *Matter of Fletcher*, 16 Am. B. R. 491, 493; *Atchison, T. & S. F. Ry. Co. v. Hurley*, 153 Fed. 503, 509.

⁷ *In re Pease*, 4 Am. B. R. 578.

⁸ *In re Barrow*, 98 Fed. 582; *In re Driggs*, 171 Fed. 897.

⁹ In the *Matter of Freeman*, 2 N. B. N. Rep. 569; *In re Ghazal*, 174 Fed. 809. See *Sibley v. Nason*, 196 Mass. 125, 131.

¹⁰ *In re Harris*, 2 Am. B. R. 1359. See In the *Matter of Oliver*, 2 N. B. N. Rep. 212, 217.

¹¹ *In re Elmira Steel Co.*, 109 Fed. 456.

¹² *In re Burka*, 104 Fed. 326.

¹³ *State Bank of Chicago v. Cox*, 143 Fed. 91. ¹⁴ *In re Mertens*, 144 Fed. 818.

¹⁵ Cf. 1 REMINGTON, BANKRUPTCY, §§ 1132-1136.

¹⁶ BANKRUPTCY ACT, 1883, 46 & 47 VICT. c. 52, §§ 43-49.

RECENT CASES.

ADMIRALTY — PRACTICE — APPEARANCE OF OWNER AFTER LIBEL IN REM; JUDGMENT IN PERSONAM. — The defendants' vessel was arrested, in a suit *in rem*, for damages caused by a collision. The defendants, who were foreigners, though not served, entered an appearance, bonded the vessel, defended the suit, and put in a counterclaim. *Held*, that personal judgment may be given against the defendants and their bail for the whole damage, though it exceeds the value of the vessel arrested. *The Dupleix*, 27 T. L. R. 577 (P. D.).

This case, following two cases on substantially the same question, may be taken to settle the law in England to the effect that, if the defendant enters an appearance in an action *in rem*, a personal judgment may be given against him. *The Dictator*, [1892] P. 304; *The Gemma*, [1899] P. 285. The arrest of a vessel on a libel *in rem* is thus given the same effect as a foreign attachment, which results in a personal action. *Atkins v. The Disintegrating Co.*, 18 Wall. (U. S.) 272. Such an attachment is the nearest approach to an action *in rem* found in the practice of the ancient admiralty court of England. See CLERKE, *PRAXIS CURIAE ADMIRALITATIS ANGLIAE*, 3 ed. (1722), 38. It seems curious that the later English cases should follow this practice in a suit professedly *in rem*, inasmuch as the conception of an action purely against the thing itself, based on a maritime lien, and quite distinct from a suit against the owner, was recognized by the Privy Council in 1850. *The Bold Buccleugh*, 7 Moore P. C. 267. Dr. Lushington, in 1842, expressed the opinion that no judgment *in personam* could be given in a suit *in rem*. See *The Volant*, 1 W. Rob. 383, 389. His view is followed in the United States. *The Monte A.*, 12 Fed. 331; *The Nora*, 181 Fed. 845.

BANKRUPTCY — DISCHARGE — EFFECT ON SURETY ON ATTACHMENT BOND. — Property of the defendant was attached more than four months prior to the filing of his petition in bankruptcy, and released on a surety bond. The defendant pleaded his discharge in bankruptcy. *Held*, that a special judgment with stay of execution may be rendered to hold the surety. *Butterick Pub. Co. v. Bowen Co.*, 80 Atl. 277 (R. I.).

Property of an insolvent defendant was attached within four months prior to his bankruptcy, and released on a surety bond. The plaintiff recovered judgment. The court granted an order upon the defendant and its surety for the production of the property attached, to enable the plaintiff to sue on the bond. *Held*, that the order should be annulled. *Wise Coal Co. v. Columbia Zinc & Lead Co.*, 138 S. W. 67 (Mo., St. Louis Ct. App.).

These cases represent the weight of authority. *U. S. Wind Engine & Pump Co. v. North Penn Iron Co.*, 227 Pa. St. 262; *Windisch-Muhlhauser Brewing Co. v. Simms*, 55 So. 739 (La.). The first rests upon the fiction that the bond is given for the lien. This is hard to sustain on principle, because the bond does not become a debt until judgment is unsatisfied. *Carpenter v. Turrell*, 100 Mass. 450. The discharge being a bar to the action, the contingency on which the surety's liability depends can never happen. See *Wolf v. Stix*, 99 U. S. 1, 9. But except for the bond, the plaintiff could enforce his lien. *Bassett v. Thackara*, 72 N. J. L. 81. A contrary decision in the principal case would mean that the plaintiff's advantage is lost if the defendant can, and retained if he cannot, obtain a surety. See *In re Albrecht*, 17 N. B. R. 287, 292. The decision accords with the spirit of § 16 of the Act of 1898, and does substantial justice. See *Hill v. Harding*, 130 U. S. 699, 703.

BANKRUPTCY — PARTNERSHIP AND INDIVIDUAL CLAIMS AND ASSETS — EFFECT OF ACT OF BANKRUPTCY ON NON-ASSENTING PARTNER. — One of

two partners executed a general assignment of firm property. In bankruptcy proceedings against the partnership and the individual partners, the partner not assenting to the assignment set up that his individual assets exceeded his individual debts. The property of the firm together with that of both partners was not sufficient to pay the firm debts. *Held*, that the non-assenting partner may be adjudged a bankrupt. *Yungbluth v. Slipper*, 185 Fed. 773 (C. C. A., Ninth Circ.).

This case is opposed to the generally approved rule that partners in a bankrupt firm cannot be adjudicated bankrupts if they have not committed or been participants in committing an act of bankruptcy. See *In re Meyer*, 98 Fed. 976, 980. This rule is a logical result of the entity theory of partnership in bankruptcy. *In re Hale*, 107 Fed. 432. But the courts fail to apply the entity theory consistently, holding that upon adjudging a firm bankrupt, the court may draw to the administration the individual estates of the partners. *Dickas v. Barnes*, 140 Fed. 849; *Francis v. McNeal*, 186 Fed. 481. Although illogical, the principal case accomplishes this result in a practical way and simultaneously provides for the partner's discharge.

BANKRUPTCY — PROPERTY PASSING TO TRUSTEE — DATE TO WHICH TRUSTEE'S TITLE RELATES BACK. — A bank, having on deposit moneys belonging to one against whom a petition in bankruptcy had been filed and having no actual notice of the filing, paid out money on checks delivered by the depositor to the payee previous to the filing of the petition. *Held*, that the bank may not be required, on summary order, to turn over to the trustee in bankruptcy the amount so paid out. *Matter of Zotti*, 26 Am. B. R. 234 (C. C. A., Second Circ.). See NOTES, p. 79.

BANKRUPTCY — PROPERTY PASSING TO TRUSTEE — LIENS WHICH ARE VOID AS TO CREDITORS. — A bankrupt gave a chattel mortgage which by the state (Ohio) law was void as to judgment creditors of the mortgagor, though good *inter partes*. The mortgagee claims his lien on the mortgaged property, now in the trustee's hands. *Held*, that the trustee takes the property free from the mortgage lien, having the right of a judgment creditor under § 47a of the Bankruptcy Act as amended by the Act of June 25, 1910. *In re Hammond*, 26 Am. B. Rep. 336 (Dist. Ct. N. D. Ohio).

This construction of the amendment to § 47a does away with the unfortunate rule of *York Mfg. Co. v. Cassell*, 201 U. S. 344. See 24 HARV. L. REV. 620. Cf. *In re Franklin Lumber Co.*, 26 Am. B. R. 37.

BANKRUPTCY — PROPERTY PASSING TO TRUSTEE — RIGHT OF ACTION FOR LIBEL. — The plaintiff, in an action for a libel concerning his credit, which caused him pecuniary damage, became bankrupt. *Held*, that the right of action did not pass to the trustee in bankruptcy. *Epstein v. Handwerker*, 116 Pac. 789 (Ok.).

For a discussion as to what rights of action in tort should pass to the trustee in bankruptcy, see 24 HARV. L. REV. 396. The principal case seems correct, as the right of action in it arises not from injury to property, but from injury to reputation; and it is only an indirect effect of the tortious act to diminish the bankrupt's estate.

BILLS AND NOTES — PURCHASERS FOR VALUE WITHOUT NOTICE — RIGHT OF MAKER TO FUNDS OF WRONGDOER HELD BY PLAINTIFF. — The plaintiff, a holder in due course of a check wrongfully indorsed to him, had, at the time of bringing suit against the maker of the check, funds of the wrongdoer in its hands. *Held*, that the defendant cannot avail itself of these funds as a set-off. *Amalgamated Sugar Co. v. United States National Bank of Portland*, 187 Fed. 746 (C. C. A., Ninth Circ.).

For a discussion of the principles involved, see 24 HARV. L. REV. 665.

CHARITIES AND TRUSTS FOR CHARITABLE USES — WHAT CONSTITUTE CHARITIES — HOSPITAL FOR EMPLOYEES MAINTAINED BY RAILROAD. — A monthly fee was deducted by the defendant company from the wages of its employees for the purpose of maintaining a hospital and providing medical services for sick and injured employees. The company derived no profit from this. An injured employee was treated by the company's surgeon and died because of the surgeon's negligence. *Held*, that the company is not liable, provided it used reasonable care in the selection of surgeons. *Arkansas Midland R. Co. v. Pearson*, 135 S. W. 917 (Ark.).

A charitable hospital is not liable for the negligent acts of its physicians and surgeons unless it has been guilty of negligence in selecting them. *McDonald v. Massachusetts General Hospital*, 120 Mass. 432. *Contra, Glavin v. Rhode Island Hospital*, 12 R. I. 411. This principle has been extended to hospitals run by railroads for the treatment of their sick and injured employees. *Eightmy v. Union Pacific Ry. Co.*, 93 Ia. 538. It has been held further, in accord with the principal case, that such a hospital run from funds deducted from the wages of employees, but without direct profit to the company, is, from the standpoint of the employees, a charity. *Texas Central R. Co. v. Zumwalt*, 132 S. W. 113 (Tex.); *Wells v. Ferry-Baker Lumber Co.*, 57 Wash. 658. If profit is derived from such a hospital, it is no charity, and the company is liable for the negligence of its physicians and surgeons. *Texas & Pacific Coal Co. v. Connaughten*, 20 Tex. Civ. App. 642; *Sawdey v. Spokane Falls & Northern Ry. Co.*, 30 Wash. 349. But, it is submitted, the mere lack of intention to make direct profit should not be the sole determining feature of a charity. *Donnelly v. Boston Catholic Cemetery Association*, 146 Mass. 163; *Newcomb v. Boston Protective Department*, 151 Mass. 215. And as in the principal case there seem to be great indirect benefit to the company and a business contractual duty to provide medical attention for good consideration, the company should be held liable. *Phillips v. St. Louis & San Francisco R. Co.*, 211 Mo. 419; *Texas & Pacific Coal Co. v. McWain*, 124 S. W. 202 (Tex.).

CHATTEL MORTGAGES — RECORDING AND REGISTRY — REMOVAL TO ANOTHER STATE. — A trust deed conveying two mules as security for a debt and providing that the mortgagor should retain possession until default, was executed and recorded in Mississippi, where the property then was, according to the laws of that state. After default in payment, the mortgagor, without the knowledge or consent of the mortgagee, removed the property to Tennessee and sold it to the defendants, *bonâ fide* purchasers without notice. *Held*, that the mortgagee has a superior title. *Newsum v. Hoffman*, 137 S. W. 490 (Tenn.).

The overwhelming weight of authority supports the rule that the interest of a mortgagee, once vested by the recording acts of one state, will be respected wherever the property goes. *Langworthy v. Little*, 12 Cush. (Mass.) 109; *Greenville Nat. Bank v. Evans-Snyder-Buel Co.*, 9 Okl. 353. As in other cases, where such recording fails as a real protection to purchasers, the rule is *caveat emptor*. *Handley v. Harris*, 48 Kan. 606. See 19 HARV. L. REV. 568. The question usually resolves into one of policy. Some courts have held that, as part of a general policy against transfers without change of possession, the rights of *bonâ fide* purchasers as against such foreign mortgages, being unprotected by their own recording system, cannot be affected by records existing in another state. This seems to be law in only three jurisdictions at most. *Corbett v. Littlefield*, 84 Mich. 30; *Miles v. Oden*, 8 Mart. N. S. (La.) 214; *Bank v. Carr*, 15 Pa. Super. Ct. 346. On the other hand, the general prevalence of recording acts justifies the policy, commonly styled comity, of recognizing and preferring the interest acquired under such a statute in another state. *Parr v. Brady*, 37 N. J. L. 201. Some authority supports the principal case in the

qualification that the removal must be without the mortgagee's consent. *Jones v. North Pacific Fish & Oil Co.*, 42 Wash. 332; *Blythe v. Crump*, 28 Tex. Civ. App. 327. But the weight of authority holds consent to be immaterial. *Shapard v. Hynes*, 104 Fed. 449; *Cobb v. Buswell*, 37 Vt. 337.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — COMPELLING RAILROAD TO PAY FOR SIDE TRACKS. — A state railroad commission directed the defendant to construct a side track from its main line, across a public highway, to an adjoining stone quarry, on condition that the owner of the latter should do all the necessary grading on his land. *Held*, that the order of the commission should be affirmed. *State v. Chicago, M. & St. P. Ry. Co.*, 131 N. W. 859 (Minn.).

The common law recognizes that adequate shipping facilities in exceptional industries requiring bulk shipments necessitate private switches. *Olanta Coal Mining Co. v. Beech Creek R. Co.*, 144 Fed. 150. Statutes perhaps require railroads to permit connection to be made with other adjacent factories. WIS. STATS., 1898, § 1802. But statutes placing the entire cost of the siding on the railroad are unconstitutional, as taking private property without due process of law and without compensation. *Mays v. Seaboard Air Line Ry.*, 75 S. C. 455. See 20 HARV. L. REV. 494. If the entire expense cannot be placed on the railroad, it would seem that to apportion the cost would be equally objectionable. *Northern Pacific Ry. Co. v. Railroad Commission*, 57 Wash. 134. In the principal case, the court argues that freight receipts will give sufficient compensation. But this overlooks the fact that charges are remuneration for carrying freight, and that shippers without private sidings would have to pay the same rates. *Cf. Chesapeake & Ohio Ry. Co. v. Standard Lumber Co.*, 174 Fed. 107, 112. The court justifies its decision also by the police power. Undoubtedly, by the exercise of the police power, a commission may require a railroad to provide adequate facilities. But the decision seems to go beyond such regulation in requiring the railroad to assume an obligation to receive goods beyond its established route.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — POWER TO FORBID WASTE OF UNDERGROUND WATER. — A state statute forbade landowners from drawing from artesian wells on their property unreasonable quantities of carbonated water, and from wasting the water as a means of collecting the gas contained therein for the purpose of vending it as a separate commodity. *Held*, that the statute does not constitute a deprivation of property without due process of law. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61. See NOTES, p. 76.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — WORKMEN'S COMPENSATION ACTS. — A Washington statute provided that workmen injured in certain "extra hazardous" employments while in the course of employment, the injury not being wilful on the part of the employee, should recover a fixed compensation from an industrial insurance fund; this fund to be established by graded, yearly contributions from employees in the industries enumerated as "extra hazardous." *Held*, that the statute is constitutional and does not violate the "due process of law" clause in the constitution. *State ex rel. Davis-Smith Co. v. Clausen*, Wash., Sup. Ct., Sept. 27, 1911.

For a discussion of a New York case involving similar principles, see 24 HARV. L. REV. 647. It will be noticed that the Washington act goes beyond the New York act by creating an annual indemnity fund to which employers are compelled to contribute irrespective of the fact that there may be no injuries among the workmen of a particular contributor during the period over which any contribution extends.

CONSTITUTIONAL LAW — VESTED RIGHTS — STATUTE MAKING ONE-TENTH OF INCOME OF SPENDTHRIFT TRUST LIABLE TO EXECUTION. — On recovering judgment from the defendant, the plaintiff moved for special execution against ten per cent of the income of a spendthrift trust created in 1879. This was permitted under a statute passed in 1908. *Held*, that the statute, in operating upon existing trust funds, was not unconstitutional. *Brearley School v. Ward*, 201 N. Y. 358.

The New York Real Property Law provides that the surplus income of a trust fund beyond the sum necessary for the education and support of the beneficiary should be liable to the claims of creditors. CONSOL. LAWS OF N. Y., 1909, REAL PROPERTY LAW, c. 52, § 98. The statute in the principal case increases the amount of income subject to execution. CODE CIV. PROC., § 1391, as amended by c. 148, LAWS OF 1908. The question is whether the statute takes away property without due process of law, in affecting existing trust funds. That depends on the nature of the beneficiary's right to exemption from execution. At common law in New York, the whole income from trust funds was liable to the claims of creditors. *Bryan v. Knickerbacker*, 1 Barb. Ch. (N. Y.) 409. The right of the beneficiary to exemption seems no greater than that of debtors under other exemption laws. Legislation decreasing the amount of exemption allowed to debtors is clearly valid. *Leak v. Gay*, 107 N. C. 468. The privilege of exemption declared by statute creates no vested right in the debtor and may be taken away by change of statute. *Bull v. Conroe*, 13 Wis. 233. See COOLEY, PRINCIPLES OF CONSTITUTIONAL LAW, 3 ed., 332. The effect of the decision in the principal case, moreover, is salutary in lessening the evils of spendthrift trusts. See GRAY, RESTRAINTS ON ALIENATION, 2 ed., xi. That the statute does not impair the obligation of a contract seems clear, for even if there be any contract its obligation is not impaired. Cf. *Holland v. Dickerson*, 41 Ia. 367.

CORPORATIONS — CAPITAL, STOCK, AND DIVIDENDS — STOCK CERTIFICATES NOT SUBJECT TO ATTACHMENT. — The plaintiff sought to obtain jurisdiction over a non-resident defendant by publication of service, and attachment of the certificates of stock of a foreign corporation, which were owned by the defendant, but bailed to a third party within the state. *Held*, that jurisdiction over the defendant has not been acquired. *Maertens v. Scott*, 80 Atl. 369 (R. I.). See NOTES, p. 74.

CORPORATIONS — DIRECTORS — ELIGIBILITY OF DUMMY DIRECTOR. — Five shares of stock were transferred to A. without consideration, and the transfer recorded. A. immediately indorsed the certificate to his grantor, but his name remained as a stockholder on the company's transfer book. *Held*, that A. was eligible to be a director under a statute requiring directors to be stockholders. *In re Ringler & Co.*, 130 N. Y. Supp. 62 (App. Div.).

Where the beneficial ownership of stock and the record title to it are in different persons, the record owner has the right to vote it, as far as the corporation is concerned. *In re Argus Printing Co.*, 1 N. D. 434. An exception is made where the record owner is a trustee of stock owned by the corporation, as such stock has no vote. *American Railway-Frog Co. v. Haven*, 101 Mass. 398. Also, where actual fraud is shown to be contemplated, the record holder may not vote. *Smith v. San Francisco & North Pacific R. Co.*, 115 Cal. 584. It seems settled that the record owner, and not the beneficial owner, is eligible to be a director under a statute requiring a director to be a stockholder. *State ex rel. White v. Ferris*, 42 Conn. 560. *Contra*, *State ex rel. Reed v. Smith*, 15 Or. 98. This rule is probably correct as a strict construction of the word "stockholder," in view of the rule as to voting. Yet it defeats the purpose of the statute, which obviously was to have the directors pecuniarily interested in

the success of the corporation. The case of a dummy director is within the above rule, and the principal case accords with the one decision exactly in point. *State ex rel. Rankin v. Leete*, 16 Nev. 242. But where the purpose of creating a dummy director is to perpetrate a fraud, his eligibility is not sustained. *Bartholomew v. Bentley*, 1 Oh. St. 37; *Frank and Kneeland v. Lewis Foundry & Machine Co.*, 24 Pitts. Leg. J. (Pa.) 33.

CORPORATIONS — STOCKHOLDERS: POWERS OF MAJORITY — EMPLOYMENT OF ATTORNEYS TO DEFEND SUIT BROUGHT BY MINORITY TO RESTRAIN ULTRA VIRES ACTION. — The majority stockholders of a religious corporation in good faith employed the plaintiffs as counsel to defend an action brought by the minority stockholders to restrain an alleged improper use of a corporate fund. The defense of the majority was unsuccessful. The plaintiffs sought to recover of the corporation compensation for their services. *Held*, that the corporation is liable. *Kanneberg v. Evangelical Creed Congregation*, 131 N. W. 353 (Wis.).

The decision in the principal case may be supported on two grounds. Either it was within the power of the corporation acting through a majority of its stockholders to make the contract; or it was an executed *ultra vires* contract to which it has no defense. But the case raises the question as to the ultimate liability of the corporation for attorneys' fees in litigation between the majority and the minority stockholders. Recovery from the corporation by the minority is conditioned upon success. They are clearly entitled to reimbursement if they succeed in restoring assets to the corporation. *Trustees v. Greenough*, 105 U. S. 527. Generally they may recover if they preserve assets by restraining an improper use of property. *Forrester & MacGinnis v. Boston, etc. Mining Co.*, 29 Mont. 397. *Contra*, *Alexander v. Atlanta, etc. R. Co.*, 113 Ga. 193. Where the majority stockholders and not the corporation are the real party in interest, they must account for corporation funds paid to attorneys. *Wickersham v. Crittenden*, 106 Cal. 329. And where they have not acted in good faith, their claims against the corporation for legal expenses will not be allowed. *M'Court v. Singers-Bigger*, 145 Fed. 103. But for mistakes of judgment honestly exercised, the corporation must suffer. See *Ellerman v. Chicago Junction Railways, etc. Co.*, 49 N. J. Eq. 217, 232. This rule should apply where, as in the present case, the majority in good faith defend unsuccessfully an action brought by the minority shareholders.

CORPORATIONS — STOCKHOLDERS: RIGHTS INCIDENT TO MEMBERSHIP — SUIT IN BEHALF OF CORPORATION BY ONE ACQUIRING STOCK AFTER WRONG. — The plaintiff, a stockholder of a corporation, brought an action to set aside as fraudulent a transfer of the stock of the corporation. He acquired the stock after the transaction was completed. *Held*, that the plaintiff may maintain the action. *Pollitz v. Gould*, 45 N. Y. L. J. 591 (N. Y., Ct. App., April, 1911).

In order to put an end to collusive transfers of stock for the purpose of getting into the federal courts, the Supreme Court has adopted a rule of procedure which requires a stockholder, who brings an action like the one in the main case, to prove that he owned stock when the alleged fraud was committed. SUP. CT. RULES OF PRACTICE, Rule 94, 104 U. S. ix. See *Hawes v. Oakland*, 104 U. S. 450. At least one state court has come to the same conclusion, arguing from general equitable principles. *Home Fire Ins. Co. v. Barber*, 67 Neb. 644. But the decision in the principal case adds to an increasing weight of authority, and is to be welcomed as supporting the better view. For a full discussion of the principles involved, see 21 HARV. L. REV. 195.

COVENANTS OF TITLE — COVENANT AGAINST INCUMBRANCES — EASEMENTS. — In an action for specific performance of an agreement to buy a piece of land, which the vendor had covenanted should be free from incumbrances,

it appeared that an irrigation canal ran across the land by virtue of an easement. *Held*, that this does not amount to an incumbrance within the meaning of the covenant. *Schurger v. Moorman*, 117 Pac. 122 (Idaho).

For a discussion of the principles involved, see 24 HARV. L. REV. 237.

DAMAGES — MEASURE OF DAMAGES — EFFECT OF RESALE IN CASES OF DELAYED DELIVERY. — The defendant contracted to deliver wood pulp to the plaintiff by the last of November, 1900, at 25s. per ton. Delivery was not made until July 1, 1901. Pulp was then worth 42s. 6d. per ton. In November, 1900, it was worth 70s. per ton. The plaintiff resold the pulp under contracts, some anterior to the contract with the defendant, and some anterior to the date of actual delivery, at 65s. per ton. He then sued for damages caused by the delay. There was no question of consequential damages. *Held*, that he may recover only 5s. per ton. *Wertheim v. Chicoutimi Pulp Co.*, [1911] A. C. 301 (Privy Council).

The general intention of the law of damages is to place the plaintiff in as good a position as he would have been in if the contract had been performed, *i. e.* to compensate only. *Hamilton v. Magill*, 12 L. R. Ir. 187, 202. With this in view, a formula for compensating for late delivery in sales of personalty has been often adopted, namely, "the difference between the value of the goods at the date fixed for delivery, and their value when delivered." This rule is, speaking generally, correct. *Clement & Hawkes Mfg. Co. v. Meserole*, 107 Mass. 362, 364. See BENJAMIN, SALES, 5 ed., 987. The principal case, however, gives as the proper measure of damages the difference between the value when the goods should have been delivered and the value represented by the price for which they were resold. If the contracts of resale could be satisfied by delivering this specific pulp only, then the rule of the principal case is probably correct. But, if any pulp of that certain grade would have answered the purposes of the sub-sale, it seems that the defendant should not take advantage of the plaintiff's good bargain in reselling. *Cf. Floyd v. Mann*, 146 Mich. 356, 369; *Rodocanachi, Sons & Co. v. Milburn Bros.*, 18 Q. B. D. 67, 77. But *cf. Foss v. Heineman*, 128 N. W. 881 (Wis.). The facts are not clear as to this. The case, however, is novel and there is a dearth of authority directly on the point decided.

DEATH BY WRONGFUL ACT — STATUTORY LIABILITY — PENAL STATUTES. — The sole beneficiary under the death statute released all claim of damages for the death. The administrator of the deceased now sues under the statute. *Held*, that the release operates as a bar. *Kennedy v. Davis*, 55 So. 104 (Ala.).

In an action for death by wrongful act, under the Missouri death statute, the plaintiff, the widow of the deceased, offered evidence of the number and ages of her minor children as evidence of loss of support. *Held*, that the evidence is admissible, as the statute is "remedio-penal." *Boyd v. Missouri Pacific Ry. Co.*, 139 S. W. 561 (Mo., Supr. Ct.).

The death statutes of most of the states are copied from Lord Campbell's Act, 9 & 10 VICT. c. 93, §§ 1, 2. Three states, however, have death statutes which do not, like that act, provide for damages based on the injury caused by the homicide. The Massachusetts statute provides for damages proportioned to the degree of culpability. MASS. R. L., c. 171, § 2. The Massachusetts decisions hold this statute penal. *Hudson v. Lynn & Boston R. Co.*, 185 Mass. 510. Yet a recent Massachusetts case intimates that there can be but one recovery against joint offenders. See *D'Almeida v. Boston & Maine R. Co.*, 95 N. E. 398, 399 (Mass.). The Alabama statute provides for damages "such as the jury may assess." ALA. CODE, § 2486. The Alabama court has many times held this statute penal, and excluded evidence of pecuniary loss. *Louisville & Nashville R. Co. v. Tegner*, 125 Ala. 593. Yet the same court has held that the defendant may be forced to give evidence against himself, as the

statute is not really penal. *Southern Ry. Co. v. Bush*, 122 Ala. 470. The principal Alabama case also treats the statute as remedial. Missouri has an expressly penal statute as to killing by a railroad. MO. REV. STAT., § 5425. The Supreme Court has treated this statute as penal, in considering its constitutionality. *Young v. St. Louis, Iron Mountain, & Southern R. Co.*, 227 Mo. 307. This court, wishing, in the principal case, to hold the statute remedial, has at last frankly fixed the true status of such a statute as "remedio-penal."

DECEIT — GENERAL REQUISITES AND DEFENSES — WHETHER ONE REPRESENTS THAT HIS ACTS ARE LEGAL. — A complaint for deceit against a director of a corporation set forth no other misrepresentation than that the directors declared a dividend, intending that the public should regard the declaration as a representation that the dividend had been earned, whereas it was in fact paid out of capital, contrary to a statute. *Held*, that the complaint sets forth no cause of action. *Ottlinger v. Bennett*, 129 N. Y. Supp. 819 (App. Div.).

A representation may be effected by conduct as well as by words, provided that it may be reasonably implied from the conduct. *Collen v. Wright*, 8 E. & B. 647. Thus, an order for goods implies, by common understanding, an intention to pay for them. *Swift v. Rounds*, 19 R. I. 527. It by no means follows that the doing of an act is an implied representation of its legality. See *Ward v. Hobbs*, 4 A. C. 13, 29; 3 Q. B. D. 150, 163, 165. Whether it is so or not would seem to depend upon whether, on the particular facts of the case, it would be so understood by a reasonable person. It is true that the defendant's intent to mislead has sometimes been treated as the determining factor. *March v. First Nat. Bank*, 4 Hun (N. Y.) 466. It is submitted, however, that his secret intent cannot affect the question whether or not his conduct amounts to a statement of fact. If his act was ambiguous, it is not less so because he desired that a certain construction be put upon it. The question in the principal case would thus be whether, on its facts, a reasonable man would take the declaration of a dividend as a representation that it was to be paid only out of profits.

EMINENT DOMAIN — COMPENSATION — DATE AS OF WHICH DAMAGES ARE ASSESSED. — A railway company entered land without consent of the owner, or prior payment of compensation, and occupied it as a right of way for sixteen years, when the owner first brought suit for damages. The state constitution provided that "private property shall not be taken for public use, or damaged, without just compensation . . . , which shall be paid . . . before possession is taken." *Held*, that the damages are to be estimated as of the date of commencement of the action or the date of the trial. *Faulk v. Missouri River & N. W. Ry. Co.*, 132 N. W. 233 (S. D.).

Where such a constitutional provision exists, there is a conflict in the authorities as to the time as of which damages should be estimated. Some courts hold that the time of entry is decisive. *Wier v. St. Louis, etc. R. Co.*, 40 Kan. 130; *Stauffer v. East Stroudsburg Borough*, 215 Pa. St. 143. Their theory is analogous to the doctrine in the case of conversion of personal property. By bringing suit for damages, the landowner treats the wrongful entry as an appropriation, and hence the damages should be assessed as of that time. Moreover the objectionable speculative element involved in estimating the compensation according to the increased or decreased value of the land at the time of trial is avoided. Other courts, however, hold that the damages are to be determined by the time of trial, since, though the railroad can lawfully appropriate the land at any time, until it does so the title is in the owner, and hence damages should be estimated as of the time of lawful appropriation. *Railroad Co. v. Perkins*, 49 Oh. St. 326; *San Antonio, etc. Ry. Co. v. Ruby*, 80 Tex. 172.

EVIDENCE — CHARACTER — PROOF OF REPUTATION OF DISORDERLY HOUSES. — In a prosecution for keeping a disorderly house, the state introduced evidence of the reputation of the house in the community. *Held*, that such evidence is admissible. *Wilson v. State*, 136 S. W. 447 (Tex., Ct. Cr. App.).

Much confusion exists in the cases as to what the real issue in these prosecutions is, *i. e.*, whether the fact to be proved is fame or reputation, or actual habit or character. *Martin v. State*, 56 So. 64 (Ala., App. Ct.). See 2 WIGMORE, EVIDENCE, § 1620. If reputation is part of the crime, then certainly evidence of reputation is admissible. *State v. Thomas*, 47 Conn. 546; *Carroll v. State*, 111 Pac. 1021 (Okl., Ct. Cr. App.). See 1 WIGMORE, EVIDENCE, § 78. But where actual habit or character is in issue, the authorities divide. Evidence of reputation then becomes mere hearsay. However, in a majority of jurisdictions, such evidence is admitted. *In re Fong Yuk*, 8 Brit. Col. 118; *Drake v. State*, 14 Neb. 535. In a very respectable minority of states the evidence is logically excluded as hearsay not falling within the recognized exceptions to the hearsay rule. *State v. Boardman*, 64 Me. 523; *Henson v. State*, 62 Md. 231. In many of these states, such evidence is now made admissible by special legislation relating to bawdy houses. CODE OF LA., 1897, § 4944; WIS. STATS., 1898, § 4581g; MD. PUB. GEN. LAWS, 1904, Art. XXVII, § 18. These statutes have been held constitutional. *State v. Haberle*, 72 Ia. 138. The Pennsylvania courts, while not admitting reputation to prove the character of houses generally, make an exception in case of bawdy houses. *Commonwealth v. Soo Hoo Doo*, 41 Pa. Super. Ct. 249. The reason for this, namely, the difficulty of getting witnesses to testify to facts within their own knowledge in cases of this nature, is well stated in an earlier Pennsylvania case. See *Commonwealth v. Murr*, 7 Pa. Super. Ct. 391, 393. The same argument is advanced by text writers for such an exception to the hearsay rule. See 2 WIGMORE, EVIDENCE, § 1620.

EVIDENCE — RES GESTÆ — TRAIN-DISPATCHER'S SHEET. — On the issue of the negligent speed of the defendant's train by which the plaintiff was injured between T. and J., after notice and failure to produce the train-dispatcher's sheet, the plaintiff was allowed to prove the running time of the train between T. and J. on the day of the accident, as it appeared on the sheet, by the testimony of a witness who had seen it within a week in the defendant's office in B. Defendant's employees testified to the existence and nature of such a sheet. Neither the telegraph operators at T. and J. who reported the data, nor the dispatcher at B. who made the entries, were produced or accounted for. *Held*, that the evidence is admissible, against the defendant, "as part of the *res gestæ* of the passing of the train by the stations." *St. Louis & Santa Fé R. Co. v. Sutton*, 55 So. 989 (Ala.).

Declarations of an agent are admissible against his principal, if made within the scope of his authority. *United States v. Gooding*, 12 Wheat. 460. The frequent misinterpretation of this rule in the phraseology of *res gestæ*, appropriate only to a distinct criterion of admissibility, has caused an unfortunate confusion strikingly illustrated by the principal case. *Cf. Texas, etc. Ry. Co. v. Lester*, 75 Tex. 56. The sheet seen by this witness was circumstantially identified with the one shown to be kept by the defendant's agents. Its admissibility against the defendant, therefore, should rest upon its being an admission. *Lemen v. Kansas City Southern Ry. Co.*, 132 S. W. 13 (Mo.). Apart from this, it could be used by the dispatcher to refresh recollection, if the original observers also testified. *The Mayor, etc. of New York v. Second Ave. R. Co.*, 102 N. Y. 572; *Chicago Lumbering Co. v. Hewitt*, 64 Fed. 314. Authorities cited by the principal case have indeed held that the mechanical medium of such reports and their life-and-death importance rendered the operator's testi-

mony unnecessary. *Donovan v. Boston & Maine R. Co.*, 158 Mass. 450; *Louisville & Nashville R. Co. v. Daniel*, 122 Ky. 256; *Firemen's Ins. Co. v. Seaboard, etc. Ry. Co.*, 138 N. C. 42. Copying weights from scale-tickets, since destroyed, has also been held sufficiently mechanical to dispense with the weigher's testimony. *Drumm-Flato Commission Co. v. Gerlach Bank*, 107 Mo. App. 426. Mere inferences from an established course of business have been relied on, out of mercantile necessity. *Fielder Bros. v. Collier*, 13 Ga. 496; *Continental Bank v. First Nat. Bank*, 108 Tenn. 374. But, whether or not such cases already encroach too far upon the hearsay rule, apparently none would justify admitting a dispatcher's sheet without his testimony, except where it constitutes an admission.

INSURANCE — GUARANTY INSURANCE — NATURE OF CONTRACT: RELATION TO CONTRACT OF SURETYSHIP. — The defendant company issued a contractor's bond guaranteeing the payment of all subcontractors. Certain subcontractors, to whose use the present action is brought, repeatedly extended the time of payment by agreement with the principal contractor. *Held*, that the defendant company is still liable on the bond for the principal contractor's obligations. *City of Philadelphia, to Use of Thompson v. Fidelity & Deposit Co. of Md.*, 80 Atl. 62 (Pa.).

For a discussion of the principles involved, see 24 HARV. L. REV. 568.

INTERSTATE COMMERCE — CONTROL BY STATES — PROHIBITION OF EXPORTATION OF NATURAL GAS. — An Oklahoma statute practically prohibited the transportation of natural gas, by means of pipe lines, out of the state, although domestic commerce was allowed. *Held*, that the statute is unconstitutional. *West v. Kansas Natural Gas Co.*, 31 Sup. Ct. 564; *Haskell v. Cowham*, 187 Fed. 403 (C. C. A., Eighth Circ.).

A state has no power to interfere directly with interstate commerce. *Pullman Co. v. Kansas ex rel. Coleman*, 216 U. S. 56. The absolute power of the State over its highways urged in support of the present statute, as a means of prohibiting the exportation of gas, must give way to the exclusive jurisdiction of Congress. That Congress has not legislated does not authorize the state to do so, for the original right to engage in interstate commerce, under the Constitution, can be regulated by Congress only. State laws prohibiting interstate commerce in game, however, have been sustained. *Geer v. Connecticut*, 161 U. S. 519; *New York ex rel. Silz v. Hesterberg*, 211 U. S. 31. A state statute prohibiting the taking of water from fresh-water streams to another state was held valid. *Hudson County Water Co. v. McCarter*, 209 U. S. 349. The right of the state to preserve its natural resources to itself would seem to be as great in the principal case. The interference with interstate commerce seems no more direct. But the nature of the state's property right in wild animals, and in streams, as compared with the complete private property right of the owner of natural gas reduced to possession differentiates the cases. See 25 HARV. L. REV. 76. The principal case seems clearly right. *State ex rel. Corwin v. Indiana & Ohio Oil, etc. Co.*, 120 Ind. 575.

JUDGMENTS — OPERATION AS BAR TO OTHER ACTIONS — DAMAGE TO PERSON AND PROPERTY CAUSED BY ONE NEGLIGENT ACT. — The plaintiff, while riding in his wagon, was struck by the defendant's trolley car and injured personally. His horse and wagon were also damaged, for which he recovered judgment. *Held*, that this does not bar an action for the personal injuries. *Ochs v. Public Service Ry. Co.*, 80 Atl. 495 (N. J., Ct. Err. and App.).

This case reverses the decision of the lower court, criticised in 24 HARV. L. REV. 492.

LANDLORD AND TENANT — REPAIR OF PREMISES — TORT LIABILITY OF LANDLORD. — The defendant leased premises to a tenant for purposes of public

amusement, retaining the right to enter and make repairs, but not covenanting to repair. The plaintiff, while lawfully on the premises, was injured, owing to the premises having, by reason of negligence, become dangerous. *Held*, that the plaintiff has no cause of action against the defendant. *Shapiro v. Wendover Hall Co.*, 45 N. Y. L. J. 2082 (N. Y., Sup. Ct., Aug., 1911).

In the absence of an agreement to repair, a landlord is not liable for personal injuries to a tenant or a member of the tenant's family, guest, or servant, who stands in the same position as the tenant, due to the defective condition of the demised premises, where the defects are not hidden defects existing at the time of letting, known to him and unknown to the tenant. *Akerley v. White*, 58 Hun (N. Y.) 362; *Galvin v. Beals*, 187 Mass. 250. And even if he has agreed to repair, it has been held that he is not so liable, — either in tort, because the failure so to repair is a mere non-feasance, or for substantial damages in contract, because damages for personal injuries are not recoverable for such a breach. *Cavalier v. Pope*, [1906] A. C. 428; *Schick v. Fleischhauer*, 26 N. Y. App. Div. 210. He is, however, liable for the condition of the part of the premises under his control, both to the tenant and to third parties lawfully on the premises, except bare licensees. *Lang v. Hill*, 138 S. W. 698 (Mo.); *Miller v. Hancock*, [1893] 2 Q. B. 177. For personal injuries to third parties, moreover, where he makes a covenant to repair, the landlord is liable for the condition of the demised premises, according to the prevailing view, either because he retains his tort obligation of due care or to avoid circuitry of action. *May v. Ennis*, 78 N. Y. App. Div. 552. See *City of Lowell v. Spaulding*, 4 Cush. (Mass.) 277, 279. But, as held in the principal case, in the absence of such a covenant, unless the premises were a nuisance at the time of letting, the landlord has no tort liability toward third persons. *Lane v. Cox*, [1897] 1 Q. B. 415; *Ahern v. Steele*, 115 N. Y. 203.

MALICIOUS PROSECUTION — BASIS AND REQUISITES OF ACTION — GARNISHMENT RESULTING IN CONSEQUENTIAL DAMAGE. — The plaintiff's wages were by statute exempt from garnishment, but his employer was accustomed to discharge any workmen whose wages were garnished. The defendant, knowing this, attempted to garnish the plaintiff's wages, and, as a result, the plaintiff was discharged. The plaintiff then brought an action for malicious abuse of process. *Held*, that he may recover. *King v. Yarbray*, 71 S. E. 131 (Ga.).

For a discussion of the principles involved, see 24 HARV. L. REV. 325.

MECHANICS' LIENS — PRIORITY OVER MORTGAGE FOR FUTURE ADVANCES. — On a bill in equity to enforce a mechanics' lien for materials furnished, the question was whether a mortgage given to secure future advances to be made under a contract took precedence over the lien as to advances made subsequently to the acquisition of the lien and with no other notice of it than the understanding that the money advanced was to be used in erecting a building. *Held*, that the mortgage takes precedence as to prior advances only. *Allen Co. v. Emerton*, 79 Atl. 905 (Me.).

Like most mechanics' lien statutes, the Maine law simply provides that the lien shall attach to any interest which the owner — that is, the equitable owner — has in the land. REV. STATS. OF ME., 1903, c. 93, § 29. Where land has been mortgaged, the mortgagor's interest obviously includes all rights not already granted to the mortgagee. If the mortgage is given as security for merely optional advances, some courts hold that it has no effect upon the equity of redemption until the advances have been made, and that, consequently, any second incumbrance takes precedence, when recorded, over the first mortgage as to subsequent advances. *Ladue v. Detroit & Milwaukee R. Co.*, 13 Mich. 380. By the weight of authority, however, a recorded mortgage

is a potential lien, and gives security for all advances made on the faith of it before receipt of actual notice of a second lien. *Ackerman v. Hunsicker*, 85 N. Y. 43. Cf. *Hopkinson v. Rolt*, 9 H. L. Cas. 514. If, on the other hand, the mortgagee has bound himself to make advances, he immediately becomes, by the better view, a *bonâ fide* purchaser to the full amount of his contractual liability, and no subsequent incumbrance can affect his rights. *Moroney's Appeal*, 24 Pa. St. 372; *Blackmar v. Sharp*, 23 R. I. 412. The English rule, however, accords with that of the principal case. *West v. Williams*, [1899] 1 Ch. 132.

MECHANICS' LIENS — WHAT CONSTITUTES MATERIALS FURNISHED. — The plaintiffs furnished lumber to make forms for a concrete building. These forms did not remain in the building permanently, but were made valueless by the use. A statute provides that "a person who performs labor or furnishes materials . . . for the improvement, in any manner, of real estate . . . shall have a lien thereon." *Held*, that the plaintiffs are entitled to a lien. *Avery v. Woodruff*, 137 S. W. 1088 (Ky.).

By the better view, a mechanics' lien statute which merely gives a new remedy to enforce a right is to be construed liberally. *Springer Land Association v. Ford*, 168 U. S. 513. See BOISOT, MECHANICS' LIENS, §§ 34-36. *Contra*, *Pugh Co. v. Wallace*, 198 Ill. 422. But even if it is considered to be in derogation of the common law, in Kentucky the principle of broad interpretation must be applied. RUSSELL, STATS. OF KY., 1909, § 4174. On this view, it has been decided by cases in which dynamite was used in construction, that to come within the words of the statute, physical incorporation into the structure of the materials furnished is not essential. *Giant-Powder Co. v. Oregon Pacific Ry. Co.*, 42 Fed. 470. On the other hand, strict construction has led to the decision that oil furnished to a railroad is not within the terms of a similar statute. *Central Trust Co. v. Texas & St. Louis Ry. Co.*, 23 Fed. 703. Taking the liberal view, the principal case appears to be closely analogous to the dynamite case, and accordingly a proper interpretation of the statute. To prevent an undue extension of the decision and to reconcile it with authorities, it is suggested that a proper delimitation would be to exclude material, such as scaffolding, which can be used again. *Oppenheimer v. Morrell*, 118 Pa. St. 189.

MUNICIPAL CORPORATIONS — LIABILITY FOR TORTS — FAILURE TO ENFORCE ORDINANCES RELATING TO USE OF STREETS. — A city passed an ordinance making it unlawful for vicious dogs to run at large and requiring police officers to kill any such dogs. Through failure of the officers to enforce the ordinance, the plaintiff was bitten. He sues the city on the theory that this was a failure to exercise a corporate rather than a governmental power. *Held*, that he may not recover. *Addington v. Town of Littleton*, 115 Pac. 896 (Colo.).

Constructing and maintaining streets in a reasonably safe condition is a corporate duty for the breach of which an action lies at common law. *Denver v. Maurer*, 47 Colo. 209. But making and enforcing ordinances regulating the use of streets is an exercise of governmental power, and for failure to enforce such ordinances there is no liability in the absence of statute. The principal case, although near the border-line, seems rightly decided. It represents the weight of authority. *Rogers v. City of Binghamton*, 101 N. Y. App. Div. 352, aff. 186 N. Y. 595; *Hull v. Roxboro*, 142 N. C. 453. *Contra*, *Taylor v. Mayor, etc. of Cumberland*, 64 Md. 68. The doctrine of the minority is criticized in 15 HARV. L. REV. 736.

NEW TRIAL — GROUNDS FOR GRANTING NEW TRIAL — PREJUDICIAL CONDUCT BY TRIAL JUDGE. — At a trial for murder the judge in making rulings did things which, probably negligible if limited to one or two instances, in the aggregate were calculated to create an atmosphere of prejudice against the de-

fendant. *Held*, that the defendant is entitled to a new trial. *People v. Kinney*, 202 N. Y. 389.

A trial judge is properly allowed a wide discretion in regard to his conduct during a trial. *People v. Smith*, 114 N. Y. App. Div. 513. But a party prejudiced by abuse of this discretion is not without remedy. Thus it is reversible error for the trial judge to make prejudicial remarks as to the argument or conduct of counsel, or as to the character or credibility of a witness. *People v. O'Hare*, 124 Mich. 515; *Wilson v. Territory of Oklahoma*, 9 Okl. 331; *People v. Converse*, 157 Mich. 29. So also is participation by the judge in the examination of witnesses in such a way as to indicate an advocacy of either side. *Adler v. United States*, 182 Fed. 464. A succession of prejudicial remarks by the court, no one of which might be sufficient to reverse the judgment, may together constitute reversible error. *State v. Coss*, 53 Or. 462. And in general, when the conduct of the judge is such that it may have prevented the trial from being fair and impartial, the granting of a new trial seems proper. *Wheeler v. Wallace*, 53 Mich. 355; *Green v. State*, 53 So. 415 (Miss.). Under the particular circumstances of the principal case, this result is provided for by statute. N. Y. CODE CR. PROC., § 527.

PLEADING — ONE PERSONAL INJURY CAUSED BY SEVERAL NEGLIGENT ACTS AS MORE THAN ONE CAUSE OF ACTION. — The plaintiff declared on a single personal injury caused by several acts of negligence of the defendant. The defendant demurred on the ground of duplicity. *Held*, that the demurrer should be sustained. *Ferguson v. National Shoemakers*, 79 Atl. 469 (Me.).

This case is a logical result of the theory that in an action for negligence the negligent act, and not the damage caused by it, is the cause of action. For a criticism of the theory, see 24 HARV. L. REV. 492.

QUASI-CONTRACTS — RECOVERY FOR BENEFITS CONFERRED WITHOUT CONTRACT — RECOVERY FOR REPAIRS UPON ROADWAY. — The defendants were the successors in title of a canal company which was under a statutory duty to repair a certain road. Upon the defendant's refusal to act, the plaintiffs, the local highway authority, repaired the road and sued for the expenses. *Held*, that the plaintiffs are volunteers and cannot recover. *Macclesfield Corporation v. The Great Central Ry.*, [1911] 2 K. B. 528. See NOTES, p. 77.

RAILROADS — LIABILITY TO TRESPASSERS — WHO ARE TRESPASSERS. — Under a working agreement between the defendant and a connecting railroad, the latter used the defendant's tracks. The plaintiff boarded a train of the connecting railroad without right, and was injured in a collision caused by the negligence of the defendant's operatives. *Held*, that he cannot recover. *Grand Trunk Ry. Co. of Canada v. Barnett*, 27 T. L. R. 359 (Privy Council, March 28, 1911).

If the plaintiff was a trespasser toward the defendant as well as the other company, he cannot recover, since there was no evidence that the defendant was wantonly reckless. *Grand Trunk Ry. Co. v. Flagg*, 156 Fed. 359. His status with respect to the defendant depends largely on the agreement between the companies, which, not being in evidence, the court infers to be a grant of a right of way by the defendant to the other company and all persons lawfully claiming under it. This inference seems reasonable and excludes the plaintiff from any right to be on the premises, rendering him a trespasser and subject to the above rule as to recovery for injuries. Where two railroads use the same right of way, each is liable for its negligence to both the passengers and employees of the other. *Eddy v. Letcher*, 57 Fed. 115; *Chicago, etc. Ry. Co. v. Martin*, 59 Kan. 437; *Grand Trunk Ry. of Canada v. Huard*, 36 Can. Supr. Ct. 655. The principal case rightly limits this rule to cases where the injured party was rightfully on the property.

RESCISSION — RESCISSION FOR FRAUD OR MISTAKE — MISREPRESENTATION AS TO FOREIGN LAW OF INCORPORATION. — The agent of a corporation induced subscription to its stock by a false representation that it was secured by the law of the state in which the company was incorporated. The subscriber was a resident of another state. *Held*, that the subscriber is not entitled to rescind. *Groner v. Economic Life Ins. Co.*, 80 Atl. 809 (Del., Ct. Ch.).

Generally, a subscriber for stock in a corporation may rescind if his subscription was induced by misrepresentation, whether fraudulent or honest. *River Silver Mining Co. v. Smith*, L. R. 4 H. L. 64; *Maine v. Midland Investment Co.*, 132 Ia. 272. But where the misrepresentation concerns the laws governing the corporation, the courts usually deny the subscriber a right of rescission. The cases proceed on two theories. Where the misrepresentation is as to the terms of a general incorporation law, it is held that this cannot avail the subscriber, being a representation of the law, of which he is chargeable with notice. *Russell v. Alabama Midland Ry.*, 94 Ga. 510. *Cf. Peters v. Lincoln & N. W. R. Co.*, 14 Fed. 319. This theory should not defeat the subscriber in the principal case, since a misrepresentation as to foreign law should be treated as a misrepresentation of fact. See *Upton v. Englehart*, Fed. Cas., No. 16,800. But where the misrepresentation is as to the terms of a special charter, the courts have taken the broader ground that the subscriber is chargeable with knowledge of the paramount law of the corporation of which he is to become a member. *Ellison v. Mobile & Ohio R. Co.*, 36 Miss. 572. See *Wight v. Shelby R. Co.*, 16 B. Mon. (Ky.) 4, 6. This theory sustains the principal case, and might well have been a short ground for deciding many cases in deceit, where the plaintiff was barred because the misrepresentation was honestly made. See *Derry v. Peek*, 14 App. Cas. 337.

RESTRAINT OF TRADE — SHERMAN ANTI-TRUST LAW — FORM OF COMBINATION. — The United States brought suit for the dissolution of the Standard Oil Company of New Jersey, a holding company, as a combination in restraint of interstate trade under the Sherman Anti-Trust Law. The evidence showed a suppression of competition by the combination by unfair methods. *Held*, that the defendant constitutes an illegal combination under §§ 1 and 2 of the Act. *Standard Oil Co. v. United States*, 221 U. S. 1.

The United States brought suit for the dissolution of the American Tobacco Company as a combination in restraint of interstate trade under the Sherman Anti-Trust Law. The control of the primary defendant over its subsidiary companies was effected partly by stock ownership and partly by the ownership of the plants of those companies. The combination had used unfair methods to suppress competition and to attain monopoly control. *Held*, that the defendant constitutes an illegal combination under §§ 1 and 2 of the Act. *United States v. American Tobacco Co.*, 221 U. S. 106. See pp. 31-58, and NOTES, p. 71.

RESTRICTIONS AND RESTRICTIVE AGREEMENTS AS TO USE OF PROPERTY — EXTINGUISHMENT OF RESTRICTION BY SURRENDER TO PARTY WITHOUT NOTICE. — A. had leasehold interests in two neighboring shops, in one of which he carried on the trade of a pork butcher, and in the other that of a general butcher. A. sold his lease and business in the latter to the plaintiff, covenanting not to engage in the trade of general butcher within three miles. The defendant, who had notice of this covenant, decided to buy A.'s business; so A. surrendered his lease in the first shop to the landlord, who had no notice of the covenant. The defendant took out a new lease of the premises and there carried on the business of general butcher, from continuing which the plaintiff sought to enjoin him. *Held*, that the restriction is extinguished. *Wilkes v. Spooner*, [1911] 2 K. B. 473 (K. B. D., C. A.).

The judgment of the King's Bench Division, which enjoined the defendant

from continuing business, is rightly reversed by the principal case, on the ground that the covenant no longer attached to the land after the surrender of the premises to the landlord, who had no notice of the restriction. For a discussion of the principles involved, see 24 HARV. L. REV. 574.

SALES — IMPLIED WARRANTIES — REASONABLE FITNESS FOR PARTICULAR PURPOSE. — The defendant bought some cloth of the plaintiff who knew it was to be used for making clothes. The plaintiff sued for the balance of the price which the defendant refused to pay because the cloth was unfit for the intended purpose. *Held*, that there was an implied warranty of the cloth's availability for use in making clothes. *Rhodesia Mfg. Co. v. Tombacher*, 129 N. Y. Supp. 420 (Sup. Ct., App. Term). See NOTES, p. 75.

TAXATION — GENERAL LIMITATIONS ON THE TAXING POWER — CONSTITUTIONALITY OF SALE OF TAX LIENS. — A statute authorized the sale of tax liens by a city to private persons, and gave the purchaser the right to enforce these liens by foreclosure proceedings. *Held*, that the statute is constitutional. *Gautier v. Ditmar*, 45 N. Y. L. J. 941 (N. Y., App. Div., May, 1911).

As there are practically no specific constitutional restrictions on taxation in New York, the present statute can only be unconstitutional if it is an improper delegation of power. If, like the old French and Roman systems of tax-farming, it included the assessment of taxes, there would probably be such delegation. See 2 COOLEY, TAXATION, 3 ed., 831. But tax-collecting requires little discretion, and the office, in contrast to other public offices, has at times been sold to the highest bidder. *Alvord v. Collin*, 20 Pick. (Mass.) 418. In the absence of statute a tax-lien is not transferable. *Hinchman v. Morris*, 29 W. Va. 673. But a party who has paid the taxes to protect an interest which he has in the property often enforces a very similar lien. *Farmer v. Ward*, 75 N. J. Eq. 33. The purchaser of land at an invalid tax sale may be given such a lien by statute, and in some states the statute recognizes that this lien is actually transferred to him from the state. *Arn v. Hoppin*, 25 Kan. 707; IND., ACTS OF 1891, c. XCIX, § 214; *Cole v. Gray*, 139 Ind. 396. In fact, in Georgia, since the statute of 1872, tax executions have been sold to the highest bidder, and the constitutionality of the sales has not even been questioned. CODE OF GA., 1911, § 1145.

TAXATION — PROPERTY SUBJECT TO TAXATION — TAXATION OF FOREIGN CORPORATIONS ENGAGED IN INTERSTATE COMMERCE. — Under a constitutional provision, a Minnesota statute assessed on an express company, organized in New York and engaged in interstate commerce, "a tax of six per cent upon its gross receipts for business done between points within this state, in lieu of all taxes upon its property." *Held*, that this is not a regulation of interstate commerce. *State v. United States Express Co.*, 131 N. W. 489 (Minn.).

The principal case presents an example of a common, though unscientific, method of taxing foreign corporations engaged in interstate commerce. Though levied in terms upon an unpermissible object of taxation, it is regarded as, in substance, a tax upon permissible objects. Since no state can regulate interstate commerce, no foreign corporation can be taxed for the privilege of doing interstate business in the state. *Atlantic & Pacific Tel. Co. v. Philadelphia*, 190 U. S. 160. But see *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, 227. So an "occupation tax" or "franchise tax" is not permissible. *Galveston, Harrisburg, & San Antonio Ry. Co. v. State of Texas*, 210 U. S. 217. But all the property of the corporation within the state, both tangible and intangible, may properly be taxed by the state. *Adams Express Co. v. Ohio State Auditor*, 166 U. S. 185. See BEALE, FOREIGN CORPORATIONS, § 741. The substance and not the form of the tax is material. *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688. *Cf. Postal Tel. Cable Co. v. City of Richmond*, 99 Va. 102, 108. And this method

of taxing in terms of gross receipts, as a means of reaching the intangible property of the corporation within the state, has frequently been declared constitutional. *Pacific Express Co. v. Seibert*, 142 U. S. 339; *Postal Tel. Cable Co. v. Adams*, *supra*. But of course the court must be satisfied that it is a *bonâ fide* taxation of property, and not a tax on the gross receipts as such.

TORTS — INTERFERENCE WITH BUSINESS OR OCCUPATION — LIABILITY FOR CONSTRAINING PLAINTIFF BY THREAT OF WRONG TO BREAK A CONTRACT. — The defendant, an ice manufacturer, at a time of great scarcity in the market threatened to break a contract to supply ice to the plaintiff, a wholesale and retail dealer, unless the plaintiff would break its contract to supply ice to a third person. The defendant's motive was a desire to sell to this third person. The plaintiff broke the contract with the third person, and the latter recovered damages from it. *Held*, that the plaintiff has a cause of action against the defendant. *Sumwalt Ice Co. v. Knickerbocker Ice Co.*, 80 Atl. 48 (Md.).

By the weight of authority, the making of a contract confers upon each party thereto a certain right *in rem*, so that either party has a right of action against a third person who without justification procures a breach of the contract by the other party. *Lumley v. Gye*, 2 E. & B. 216; *Heath v. American Book Co.*, 97 Fed. 533. There would seem to be no logical reason why a contracting party's rights are not equally infringed when he himself is coerced to break the contract. *Lynch v. Quincy*, 11 HARV. L. REV. 469. Although in the principal case the plaintiff's cause of action must arise in a sense from his own wrong, in many cases the parties have been held not to be *in pari delicto* where they were not in equal degrees of guilt or where one party had exercised undue pressure upon the other. *Gray v. Boston Gas Light Co.*, 114 Mass. 149; *County of La Salle v. Simmons*, 10 Ill. 513. Since the court could find that "the act of the plaintiff was not voluntary," the case may be regarded as a novel but logical and justifiable extension of the doctrine of liability for wrongful interference with the contract relation.

WITNESSES — PRIVILEGE AGAINST SELF-INCRIMINATION — PRIVILEGE OF CORPORATE OFFICER ORDERED TO PRODUCE INCRIMINATING BOOKS. — In an investigation by a federal grand jury, a *subpœna duces tecum* was issued to a corporation ordering it to produce certain books. These books were kept by the president, who refused to produce them on the ground that they would incriminate him personally. *Held*, that the constitutional privilege against self-incrimination does not justify such a refusal. *Wilson v. United States*, 31 Sup. Ct. 538; *Dreier v. United States*, *id.* 550.

There are authorities against these cases. *Ex parte Chapman*, 153 Fed. 371; *Rex v. Cornelius*, 2 Str. 1210; *Rex v. Purnell*, 1 W. Bl. 36. They seem, however, to be correctly decided. It is well settled that the constitutional right not to be a witness against oneself may be waived by testifying on the subject matter involved. *Fitzpatrick v. United States*, 178 U. S. 304; *State v. Nichols*, 29 Minn. 357. So one who keeps public or quasi-public records required by law waives his privilege against self-incrimination to such an extent that he may not lawfully refuse to produce them. *Bradshaw v. Murphy*, 7 C. & P. 612; *People v. Coombs*, 158 N. Y. 532; *State v. Donovan*, 10 N. D. 203. The right of the state to create such situations, demanding by implication a waiver of this constitutional protection, has been upheld as constitutional within wide limits. *State v. Davis*, 68 W. Va. 142. But *cf. People ex rel. Ferguson v. Reardon*, 197 N. Y. 236; *People v. Rosenheimer*, 128 N. Y. Supp. 1093. By virtue of the visitatorial power reserved to the state and federal government, a corporation has no privilege against self-incrimination, and, as far as the corporate entity itself is concerned, must produce evidence against itself when so ordered.

Hale v. Henkel, 201 U. S. 43, 74; *State v. Standard Oil Co.*, 218 Mo. 1. So one who becomes an officer of a corporation must be held to waive his privilege to this extent, that he must disclose such facts and produce such evidence as the corporation is required to disclose or produce through him as its proper agent. But see 3 WIGMORE, EVIDENCE, § 2259.

BOOK REVIEWS.

THE SPECIAL LAW GOVERNING PUBLIC SERVICE CORPORATIONS AND ALL OTHERS ENGAGED IN PUBLIC EMPLOYMENT. By Bruce Wyman, A.M., LL.B., Professor of Law in Harvard University. New York: Baker, Voorhis and Company. 1911. In two volumes. pp. cxcvii, xxvi, 1517.

After the great American text-books of the middle of the nineteenth century, which in more than one case rose to a position of quasi-authority and in many cases contributed not a little to the development of the law, a period of digest text-books set in, in which servile following of the letter of judicial decisions was taken to be a merit and it was assumed that a bare exposition of the points decided or a formulation of such points in abstract propositions was statement of "the law," and hence was the function of the practical law-writer. While these ideas prevailed, the boast of the careful writer was that he had cited all the cases; as to other matters, he could say, with the prologue to Alfred's Laws, "I durst not venture to set down in writing much of my own." The period was not one of juristic sterility, as the acute and well-reasoned discussions in legal periodicals of the time demonstrate. Until the mechanics of digest-making had been brought to what it is now, the text-book was needed to do the work of an index to the reports. Today, no text-book can compare with the digests and cyclopedias in this service, if for no other reason, because there is no way of keeping it continually up to date. In consequence text-books must be mere elementary sketches for students, or else must lead and guide as did the classical works of an earlier period, or they are not worth while. Professor Wigmore's treatise on Evidence has shown us that the time for texts which shall shape the law, and not merely mould headnotes or digest paragraphs into literary form, has by no means gone by. The influence which that book is exerting before our eyes witnesses that the law schools may do no less for the law today than they did in the classical days of Kent and Story and Greenleaf. Indeed, even more than that time, the present is a period of legal development. Professor Wyman is to be congratulated, therefore, upon the opportunity of expounding a great branch of the law, while its details are still formative and before its main outlines have rigidified, at a time when juristic development of the materials of the common law on a large scale has regained its place in our legal literature.

As the first to treat of the law of public service companies as a unit, the author has had the opportunities and has had to meet the difficulties of the pioneer. On the one hand, he has had free scope for analysis and for the working out and development of a consistent theory of his subject. On the other hand, in the construction and application of the theory, he has had to take many steps in the dark, or at least in what the common-law lawyer is likely to consider the dark — namely, the light of pure juristic theory. But the time has come for many steps in that light in more than one department of our law.

Obviously the older method of calling this or that a common carrier by analogy, so that the test of a public calling might be how far it could be put in the category of common carrier without too violent straining of fiction, was

impossible except as a temporary device. For a time the analogy served well enough. But industrial development has produced a large number of callings that require a broader principle and a more rational treatment. As a result of historical inquiry on the one hand and of analysis of the modern decisions upon the other, Professor Wyman finds this principle in legal regulation of public callings by imposing general affirmative duties upon those engaged therein over and above the negative duties of a general character which the law imposes upon private persons. In other words, the person engaged in such a calling is not dealt with as a normal or standard person. He is put in a class by himself and, if one may take such a liberty with a well-known phrase, what is law for him is not law for the average person. In the law of torts, we find a number of duties toward all men of a negative character, such as to refrain from intentional injury to others, to refrain from negligent injury to others, not to permit injurious operation of certain dangerous agencies made use of at one's peril, and the like. As to other matters, the duties of the ordinary man depend, for the most part, upon his voluntary assumption of them. But one who is engaged in a public calling, in addition to the general negative duties resting upon all men, is subject to general affirmative duties imposed directly by law. The reason for the imposition of these duties, and so the criterion of a public calling, the author finds in monopoly, state-granted, natural, or virtual, of some matter (not necessarily service) of general need under conditions of life and of commercial and industrial activity for the time being. The history of the common law shows that at different periods courts have differed much as to what are public callings, and that the reasons of such differences are to be found in diverse economic conditions. The question is not, therefore, what has been held at some time or other to be a public calling or the reverse, but rather what has been the principle upon which at bottom judicial determinations of the nature of various callings have proceeded. The case of state-granted monopoly, or, as Professor Wyman puts it, monopoly due to legal privilege, is clear enough. The other classes of cases, natural monopoly and virtual monopoly, require more consideration.

Natural monopoly, we are told, may be due to restriction of supply, scarcity of sites, limitations of time within which the needs of patrons must be met, if at all, and difficulty of distribution. Here the nature of the service rendered involves power of extortion or oppression in those who render it, and so demands legal regulation in the public interest. Virtual monopoly, we are told, may exist because of cost of plant, the large scale on which service is performed, the inadequacy of available substitutes, or the dependence of the service rendered upon other activities. In these cases, although obviously the line cannot be drawn sharply, it is not the nature of the undertaking itself but the circumstances in which it is carried on in the time and jurisdiction in question that determine the decision. Hence the question must be largely one of fact. "If," says the author, "monopoly is made out as the permanent condition of affairs in a given business, then the law will consider that calling public in its nature. On the other hand, if effective competition is proved as the regular course of things in a given industry, the law will hold all businesses within it as private in their character."

Probably the second category, natural monopoly, will be accepted by all but a few obstinate adherents to nineteenth-century economic ideas. With respect to the third, virtual monopoly, there are likely to be many who will hesitate. To some the conception that the same business, involving no state-granted privilege and no natural monopoly, may or may not be public, according to the relative permanence of a condition of effective competition, will grate upon a feeling that the law is from eternity and that a legal system must settle that every calling is abstractly the one thing or the other. To others, the conception of virtual monopoly will seem to involve danger of an undue

extension of the class of public callings and hence of state interference. But our law must come more and more in every department to just such flexible conceptions as this. Abstract hard and fast categories seldom have much relation to actual conditions to which law is to be applied. If cases are crammed into them with logical rigor, injustice results. If the severity of logic is relaxed, our hard and fast dogmas achieve nothing; we have one law in the books and another, or sometimes none, in practice. Such subjects as the one in hand, involving economic and social questions at so many points, require a few clear principles rather than a mass of rigorous rules, if the law is to deal with them effectively. As to the other point, perhaps the limitation to cases of necessity will meet reasonable objections. In case of natural monopoly, the author points out that the basis is public need. "This extraordinary activity of the state on behalf of the individual," he says, "is . . . confined to necessary services." It is true this also is a very flexible criterion. But so are many of the most useful doctrines of our law. Such conceptions as reasonable time are worth a multitude of sharply drawn rules. Moreover flexible principles such as those in question appear to stand the test of application to every phase of the subject throughout the book.

Lawyers and students of American legislation will agree, no doubt, in approving the author's insistence upon the sufficiency of the common law for the whole subject of public callings. The affirmative duties which the common law imposes upon those engaged in these callings, if enforced, would clearly meet every reasonable requirement. But the common-law machinery for enforcing these duties has proved cumbrous and ineffective. Assuming mistakenly that the law was inadequate, legislators have multiplied statutes on matters of substance which have achieved little because directed to the wrong point. Indeed, they have added difficulties of interpretation to difficulties of enforcement and application already existing. It is not too much to say, as the author says, that "the common law is adequate to deal with all real industrial wrongs," provided we address ourselves vigorously and intelligently to the difficult problem of enforcement. Until we do this, eulogy of the common law will be lost upon an impatient public.

The work of preparing an adequate treatise upon so large a subject under American conditions, which require a canvassing of the huge annual judicial output of some fifty jurisdictions, may well give pause to one who would think about cases as well as collect them. Hence the author need not remind us that he has been hurried in producing his book at this period in the development of the subject. Undoubtedly it is of advantage to have such a work today rather than tomorrow or the day after. And yet one can only regret that so good a book should have to go forth with so many marks of hasty preparation. A style at times very colloquial, *naïvetés* such as the statements in the preface that the author has "had a policy of a sort" in choosing the cases to be cited and that he is "rather proud" of his analysis, and repetitions of the same matter in the very same words in different connections (*e. g.* preface, p. vi, repeated in § 35, preface, p. viii, repeated in § 42, the paragraph at the bottom of p. ix, repeated in part on p. 29), are easily accounted for by the exigencies of dictation, but are regrettable blemishes upon a performance which in other respects is admirable.

R. P.

LAW OF REAL PROPERTY: Chiefly in Relation to Conveyancing. By Henry William Challis. Third edition, by Charles Sweet of Lincoln's Inn. London: Butterworth and Company. 1911. pp. xlv, 524.

Of all English writers on the law Mr. Challis most resembles Littleton. In both we find a mathematical exactness and an absence of every unnecessary word, coupled with a limp, and one may almost say a flowing, style.

Compare the present book with Leake's Land Law, — an admirable book, but reading it is like reading a digest.

No better model of legal style could be studied by American lawyers and judges, for verbosity is a fault to which both bench and bar, taking the country at large, have been addicted, and Mr. Challis will show them how to be concise without being crabbed.

The book covers a very narrow field, and one very uninteresting to the general reader; but even the general reader will feel the attraction there is in seeing the master of any subject doing his best, and putting forth his full power at every point. We have no doubt that Mr. Challis was justified in speaking of the pains it cost him to frame his sentences.

Mr. Challis treats only of the law as it is. Obsolete law he deals with only so far as it is necessary to explain existing law.

His starting point seems to be about the end of the fifteenth century. Since that time the law has been changed by statutes, and with these Mr. Challis of course deals. He is very chary of admitting that the original common law could be modified without statute.

The modern English statutes have profoundly altered the common law, much more than statutes in this country have done, and on different lines. We therefore advise the American reader to examine only cursorily Mr. Challis's remarks on the late English statutes, or to skip them altogether. The rest of the book cannot be too closely studied.

Mr. Challis, as we have said, omits obsolete law; but he delights in legal rarities, which, though they seldom or never occur in practice, may yet be theoretically possible. In Chapter XIX the topic of Qualified Fees Simple he rolls like a sweet morsel under his tongue, and one feels his regret that the "very curious and entertaining" law of remitter is obsolete (p. 90). Mr. Challis's mathematical turn of mind is shown in his working out (p. 372) the formula for determining the series of accruing shares in the case of cross remainders.

If Mr. Challis has taken Littleton for his model, it is fortunate that Mr. Sweet has not taken Lord Coke for his. He has not overlaid and swamped the text of his author with comment, but has wisely confined his judicious annotations to instances where they were really called for. Many of them will be found helpful; see, for instance, the suggestive note (p. 167) on the probable origin of the Rule in Shelley's Case.

Mr. Sweet is, as all editors ought to be, in sympathy with his author's general trend of thought; but his admiration is not servile. He sometimes doubts Mr. Challis's conclusions, for instance on determinable fees (p. 437); and on the right of the donor to the land of a dissolved corporation (p. 467).

The principal independent additions that Mr. Sweet has made are: On Corporeal and Incorporeal Hereditaments (p. 48); on Dignities and Titles of Honour (p. 468); and on the Rule against Perpetuities (pp. 205 *et seq.*, 472).

Mr. Sweet, as is well known, is a strenuous *factor* of the view that contingent remainders are not subject to the Rule against Perpetuities, but to an independent rule which prevailed at common law before the Rule against Perpetuities was invented; namely, that you cannot limit a contingent remainder to the child of an unborn person after a life estate to such person.

There are two arguments for the existence of such an independent rule: First, that it is actually given in the old books; second, that it is a necessary consequence from the un-non-barrableness (if we may invent such a Germanic word) of fees tail. Mr. Sweet has dealt in other writings with the first argument; in this edition of Mr. Challis he confines himself, so far as we have observed, to the second.

This is not the place for a discussion of the question, but whether one agrees with Mr. Sweet or not, he is the ablest living advocate of his side of the case, and his views deserve the most careful consideration.

J. C. G.

TREATISE ON THE LAW OF VENDORS AND PURCHASERS OF REAL ESTATE AND CHATTELS REAL. By T. Cyprian Williams. Second Edition. In two volumes. London: Sweet and Maxwell, Limited. 1910, 1911. pp. xlviii, 1-867, xxxiv, 869-1771.

Mr. Williams has long been known to the profession on both sides of the Atlantic as the accomplished editor of the books of his distinguished father, Mr. Joshua Williams. The Treatise on Vendors and Purchasers, his *magnum opus*, has added to his reputation. We are glad to see that its merits have been so well recognized that a second edition is already called for.

The law on the sale of land has developed in the United States on very different lines from those on which it has developed in England. Here the registry system is universal. The statutes establishing it are generally simple and short, but a great body of law has grown up around them. The vast amount of land belonging to the nation or to the several states has given rise to a great deal of law which is peculiar to conveyances of such land. The discovery of a great amount of mineral land has created a complicated body of mining law. The rest of the law of vendors and purchasers has been little affected by any statutes except the Statute of Frauds.

In England the registry laws have had but a limited application. Only one chapter of Mr. Williams's treatise is devoted to the sale of registered land. It is seldom that there is any conveyance of Crown land. There has been no recent great discovery of mineral land. But there has been a great deal of legislation, especially in the second half of the last century, as to other matters concerning the sale of land.

Of course, Mr. Williams has much to say about these statutes, which has little direct relevancy to any questions likely to arise in the United States, but it by no means follows that Mr. Williams's book is not of value to an American lawyer; on the contrary, the book abounds in thorough and interesting discussions on many matters entirely independent of these recent statutes, which throw light on the law of vendors and purchasers, and indeed on the law of contracts generally.

We have noticed among the fundamental matters with which Mr. Williams deals: Sales by auction; restrictive covenants, or, as they are sometimes called, equitable easements; the fourth section of the Statute of Frauds; the discharge of contracts, and remedies for the breach of contracts, including suits for specific performance. We wish to call attention especially to what Mr. Williams has to say on mistakes and fraudulent misrepresentations. He has made a noteworthy contribution to this difficult part of the law.

There is only one criticism we have to make, and that is one we should make to many law books. We wish Mr. Williams had distinguished the paragraphs by section numbers. These, it is true, somewhat mar the appearance of the page, and sometimes interrupt the continuity of the thought; but when a book is to become a classic, and be often reprinted, a division into sections furnishes a means of reference which is the same in successive editions, and is often a great convenience.

J. C. G.

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LEGAL CAUSE IN ACTIONS OF TORT.

PROFESSOR JAMES B. THAYER has said that one office or problem of the courts, in laying down the law of evidence, is to determine when to exclude proof of facts which are really relevant.¹ Do not some courts, in laying down the rule of legal cause, proceed upon the supposition that one problem before them is to determine when to exempt a tortfeasor from liability for effects which were in reality caused by his tort?

Assume that the conduct of the defendant, either in the form of commission or of omission, was wrongful in law as against the plaintiff.

Assume also that the plaintiff has suffered damage of a kind which the law will notice and will afford redress for.

Then the problem is, whether the court will regard the defendant's conduct as the cause, in the legal sense, of the damage to the plaintiff, and will hold the defendant liable for such damage.²

This problem may be subdivided as follows:

1. Was defendant's tort in fact the cause of plaintiff's damage?
2. If so, is there any arbitrary rule of law absolving defendant from

¹ See Thayer, Preliminary Treatise on Evidence at the Common Law, 1, 4, 180, 264, 265, 266.

² "It is no ground of action that one person has done a wrong and another has suffered an injury, unless the latter is a product of the former. To sustain a suit, the two must be cause and effect." Bishop, Non-Contract Law, § 37.

liability for all, or any part of, the damage of which his tortious conduct was in fact the cause?

The question is not what philosophers or logicians will say is the cause. The question is what the courts will regard as the cause.

As to what is the cause of an event, philosophers and logicians may differ from jurists.³ John Stuart Mill, in his work on Logic,⁴ says, in substance, that the cause of an event is the sum of all the antecedents, and that we have no right to single out one antecedent and call that the cause. Whether from the standpoint of philosophy or logic Mr. Mill is right is a question which it does not concern us here to discuss. His view cannot be adopted as a working rule by courts. On that view no tortfeasor would be regarded as the cause of any damage. The practical question for a jurist is whether the tortious conduct of any human being has had such an operation in subjecting a plaintiff to damage as to make it just that the tortfeasor should be held liable to compensate the plaintiff.

"The lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause."⁵

If, for practical legal purposes, we reject the philosophic view of causation, and instead adopt the juristic view, it follows that the defendant's tort, in order to be regarded as the legal cause of the damage, need not be the sole cause, need not be the only causative antecedent.⁶ Whether defendant's tort must be the predominant antecedent is a question to be considered later.

How shall the law define the term "legal cause" as used in reference to actions of tort? What is the legal test of the existence of causal relation?

³ ". . . the proximate cause of the law is not the proximate cause of the logician. . . ." See Henshaw, J., in *Merrill v. Los Angeles Gas, etc. Co.*, 158 Cal. 499, 503, 111 Pac. 534, 536 (1910).

⁴ Mill, *Logic*, 9 Eng. ed., 378-383.

⁵ Pollock, *Torts*, 6 ed., 36. Cf. 1 Sutherland, *Damages*, 3 ed., § 16.

The difference between the philosopher and the jurist is well brought out in 4 Am. L. Rev. 211-214, by Mr. N. St. John Green, who was amply competent to view the subject from both standpoints. Cf. Prof. Bingham, 9 Col. L. Rev. 34, 35.

⁶ For the construction given to the words "the direct and sole cause" in a policy of insurance, see *Mardorf v. Accident Ins. Co.*, [1903] 1 K. B. 584.

As to these questions there is a remarkable conflict of authority. Several definitions or tests have some support, but there are strong reasons for holding that no one of them can be universally applied with satisfactory results. One or two of them may not even purport to cover all cases. Others may work justice in many cases but not in all.⁷

If, however, these tests are all rejected, the question comes, what shall be substituted. The answer given by some able jurists sounds like a counsel of despair. They appear to think that it is impossible to state a test. If this is so, it might seem to some lawyers undesirable to criticize and discard the tests hitherto commonly adopted. A bad test, consistently applied, would seem to some lawyers better than no test at all. General uncertainty might be thought a greater evil than the certainty of occasional injustice. It is often unadvisable to destroy a defective edifice until we are prepared to construct a better building in its place. Now we frankly admit that any test which we may hereafter suggest cannot be regarded as a finality, as an ultimate solution of all difficulties, as the last word to be uttered on the subject. At the utmost, it will be only a rough approximation to correctness, and it will be open to plausible objection on the ground of vagueness and indefiniteness. But it is believed possible to enunciate a general rule which, while open to some criticism, is less objectionable than any of the tests which have hitherto received strong support. Hence it seems expedient to consider the objections to these former tests.

As to tests or rules of causation which have hitherto been advocated, the present discussion will be concerned principally with the alleged rules which would make causal relation depend upon the probability or improbability of a certain result, *i. e.*, rules which would make the probability or improbability of a result the test of causal relation between the commission of defendant's tort and the happening of that result. It is to the consideration of these alleged tests that much of our space will be devoted.

⁷ "It is sometimes necessary in applying legal rules to do injustice to individuals ; but where a rule [an alleged rule] of unwritten law is doubtful, the fact that its application is likely frequently to do injustice is a weighty argument against its existence. It becomes then necessary to show in its support either that it is upheld by precedents too many and clear to be questioned, or that on the whole it does conduce to justice and that it is not practicable to define or limit it in such a way as to avoid the hardship." Terry, *Leading Principles of Anglo-American Law*, § 354, p. 351.

But it seems desirable first to consider briefly other tests or rules which have been suggested; and see what, if any, objections can be urged against each of them.

The test or rule which is quoted in the law books more frequently than any other is what is called "Lord Bacon's maxim," accompanied by his comment thereon:

"In jure non remota causa, sed proxima, spectatur."

"It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause; and judgeth of acts by that, without looking to any further degree."⁸

This maxim, with its gloss, is frequently cited as "an all-sufficient statement of the reasons for every decision upon a question of legal cause." Indeed the expression "proximate cause" is generally used instead of "legal cause," and it is often under the former head that one must look in digests for authorities on causation.

This use of the maxim as a universal solvent of difficulties has been productive of infinite confusion and error. Taking the words in their natural signification, the maxim is not a correct statement of the law.⁹ Taken literally, the maxim would be understood as implying that the antecedent which is nearest in space or time is invariably to be regarded as the legal cause; and it might also be understood as putting material antecedents, forces of nature, on an equal footing with voluntary and responsible human actors. But it is a mistake to suppose that contiguity in space or nearness in time are legal tests of the existence of causal relation. No doubt these elements are often important to be considered in determining the question of fact as to the existence of such relation; but lack of contiguity or nearness would not, as matter of law, conclusively establish that the defendant's tort was not the cause of the damage.¹⁰

Bacon's language has repeatedly been criticized.

⁸ Bacon's Maxims of the Law, Regula I.

⁹ See, however, Professor Beale's "true reading of this maxim." 9 HARV. L. REV. 80, 81.

¹⁰ Of course a defendant is not exonerated from liability for consequences merely because they are postponed. If a certain effect is traceable to the original injury, the author of that injury may be liable although the effect did not appear until after a

" 'Remoteness' again is an utterly misleading and illogical term. It comes from the hazy and incorrect maxim, '*in jure proxima causa, non remota, spectatur*,' as elaborated by Sir Francis Bacon (Maxims of Law, Reg. I), in his continually quoted, but ridiculously unscientific comment, 'it were infinite to consider the impulsions of causes one upon another,' etc. It is just this which the law has to consider. It is not a question of remoteness and proximity, but of causation or non-causation." ¹¹

" . . . proximate cause as a term to indicate the relation of legal cause and effect is a misnomer." ¹²

"With reference to this maxim, nothing could be more misleading than to take it in its plain, primary sense; in that sense the law as often regards the 'remote' and disregards the 'proximate' cause, as it does the contrary." ¹³

"If taken in what was apparently its original and literal meaning, that in case of doubt to which of two causes an injury or loss is to be assigned, you are to attribute it to that nearest in time or space, or which was in activity at the moment of the consummation of the injury or loss, the maxim is not only logically unsound, but opposed to the general current of the authorities. . . . the reasonable inquiry, I submit, is not which is nearest in place or time, but whether one is not the efficient, producing cause, and the others but incidental." ¹⁴

There is no "general test" of proximateness or remoteness. The terms are "always ambiguous." ¹⁵

"It is certainly true that the court which follows strictly and without expansion the maxim *causa proxima, non remota, spectatur*, will go so far astray as to be unable to deal out justice to deserving suitors." It is the duty of the court "to ascertain and give effect to the spirit of the principle which the maxim dimly indicates but does not fully express." ¹⁶

considerable interval. See *Bishop v. St. Paul City Ry.*, 48 Minn. 26, 50 N. W. 927 (1892), where plaintiff's paralysis, which did not develop until seven months after the accident, was found to have been caused by defendant's tort. See *Alvey, C. J.*, in *Sloan v. Edwards*, 61 Md. 89, 99 (1883); 36 Am. St. Rep. 828, note; *Purcell v. Lauer*, 14 N. Y. App. Div. 33, 43 N. Y. Supp. 988 (1897).

¹¹ Bower, Code of the Law of Actionable Defamation, 315.

¹² 1 Street, Foundations of Legal Liability, 122.

¹³ Bigelow on Torts, 7 ed., § 98.

¹⁴ Thomas, J., dissenting opinion in *Marble v. Worcester*, 4 Gray (Mass.) 395, 406 (1855). See also Powers, J., in *Marsh v. Great Northern Paper Co.*, 101 Me. 489, 502, 64 Atl. 844, 850 (1906); Marshall, J., in *Deisenrieter v. Kraus-Merkel Melting Co.*, 97 Wis. 279, 284-285, 72 N. W. 735, 737 (1897); 1 Sedgwick, Damages, 9 ed., § 111 d.

¹⁵ 1 Sedgwick, Damages, 9 ed., §§ 111 b, 112.

¹⁶ Elliott, J., in *Louisville, etc. Ry. Co. v. Nitsche*, 126 Ind. 229, 238, 26 N. E. 51, 54 (1890).

"... the word 'proximate' is unfortunately used, and seems often to mislead the inquirer, and to produce misapprehension of the real rule of law. That which is the *actual* cause of the loss, whether operating directly, or by putting intervening agencies — the operation of which could not be reasonably avoided — in motion, by which the loss is produced, is the cause to which such loss should be attributed."¹⁷

"It [Bacon's Maxim] is not intended to apply to a cause remote as regards distance, or remote in point of time, for so long as the loss is in the sequence of the antecedent, without other independent coöperating cause, neither distance nor time can affect the question."¹⁸

"The expression, indeed, remoteness is calculated to mislead, since a man may be held the cause of, and liable for, damage which may be a very remote consequence of his conduct, provided there be no intermediate cause to which it can be more properly referred."¹⁹

Another alleged test of the existence of causal relation is one which is occasionally found in instructions to juries, but is not likely to be sustained in a well-considered opinion of an appellate court. It is sometimes called "The But for Rule" or "But for which Rule," and sometimes "The *Causa sine qua non* Rule."

¹⁷ Martin, C. J., in *Brady v. Northwestern Ins. Co.*, 11 Mich. 425, 445 (1863).

¹⁸ Guthrie Smith, *Damages*, 380.

¹⁹ Dicey, *Parties*, 411.

As to the general subject, see also 4 Am. L. Rev. 210, 214; 9 Col. L. Rev. 144, note 20; 15 HARV. L. REV. 542-543; Terry, *Leading Principles of Anglo-American Law*, § 542; 33 Can. L. J. 713, 714; Willard, *Law of Personal Rights*, 235.

Various words and phrases used in reference to causation are criticised by Mr. Green in the following passage in 8 Am. L. Rev. 518-519:

"It is said that a recovery can be had for 'certain but not for uncertain damage'; for 'the proximate and natural consequences of the act complained of, but not for remote or consequential loss,' that 'the damage must arise naturally'; that 'it must be the fair, legal, and natural result of the act'; or, as Mr. Greenleaf expresses it (2 Greenl. Ev. 210), 'the damage to be recovered must always be the natural and proximate consequence of the act complained of.'"

"Now all these expressions are vague: they mean little; and in the majority of instances in which they are employed they probably mean nothing. No person who uses one of them, if asked what he means by it, can give a well-defined explanation. Such sentences are not a solution of a difficulty; they are stereotyped forms for gliding over a difficulty without explaining it. When a court say this damage is remote, it does not flow naturally, it is not proximate; all they mean, and all they can mean, is that under all the circumstances they think the plaintiff should not recover. They did not arrive at the conclusion of themselves by reasoning with those phrases, and by making use of them in their decision they do not render that decision clearer to others. The employment of such phrases has never solved one single difficulty. . . ."

This test or rule affirms that the defendant's tort is the legal cause of the plaintiff's damage if, but for the commission of defendant's tort, the damage would not have happened.

If this statement is turned round and put in a negative form, it can generally be applied as a test of what is *not* the cause of an event.

Generally speaking, a defendant is not liable, unless it be true that, but for his tortious act, the damage would not have happened. A defendant's tort cannot generally be considered the legal cause of plaintiff's damage, if that damage would have occurred just the same even though defendant's tort had never been committed.²⁰

But it is a mistake to apply the "but for" rule affirmatively, as constituting a sole sufficient test of causation, as was done in the charge to the jury in *Gilman v. Noyes*.²¹

The "but for" requirement is generally one of the indispensable elements to make out legal cause. But it is not the only requisite element; it is not *per se* an all-sufficient element. The fact that the damage would not have happened, "but for" the commission of the defendant's tort, does not invariably justify the conclusion that the tort was the cause, in the legal sense, of the damage. At the present day, a *causa sine qua non* is not regarded as being necessarily the *causa causans*.²² There is no absolute rule that defendant is the legal cause if there is a tortious act of his *anywhere* in the chain of antecedents, no matter how far back. The defendant's tort must be distinctly traceable as one of the substantial efficient antecedents; as having had a substantial share in subjecting plaintiff to the damage. A tort very remote in time or space may have practically spent its force and may not have been potentially oper-

²⁰ See *Sowles v. Moore*, 65 Vt. 322, 26 Atl. 629 (1893). The only exception we can think of is where two or more tortious causes are simultaneously operating, each being independent of the other, and each being alone sufficient to produce the damaging result; e. g., X. and Y., each acting independently of the other, simultaneously shoot at B., and each hit him in a vital spot. B. is instantly killed; and each shot alone was sufficient to produce death. X. could not escape on the plea that the death would have resulted just the same if his tort had never been committed. See *Watson, Damages for Personal Injuries*, §§ 60-64, and § 43. See also *Corey v. Havener*, 182 Mass. 250, 65 N. E. 69 (1902).

²¹ 57 N. H. 627 (1876).

²² See *Ladd, J., Gilman v. Noyes*, 57 N. H. 627, 631-632 (1876). "The primitive conception of a sufficient legal cause was a *causa sine qua non*." Professor Bohlen in 21 HARV. L. REV. 234-235. At an early day the "but for" rule prevailed. 2 Pollock & Maitland, *History of the Common Law*, 2 ed., 470.

ative at the time of the harm; or its effect may have been infinitesimal.²³ To constitute the tortious conduct of a defendant the legal cause of the damage suffered by the plaintiff, "its connection must be something more than one of a series of antecedent events without which the injury would not have happened."²⁴

Probably there are cases where no injustice would result, if the "but for" rule was given to the jury as the sole test of causative relation. Judge Ladd, whose opinion is always entitled to consideration, seems to have thought that *Gilman v. Noyes* was a case of this class.²⁵ But Judge Ladd, in the same opinion, explicitly denied that the "but for" rule could be universally applied as the sole test in determining the existence of causal relation.²⁶

Another alleged test of the existence of causal relation is based upon the distinction between a cause and a condition.

But although we may reject Mr. Mill's view — that we have no right to give the name of cause to any one out of a number of antecedent conditions²⁷ — still the alleged distinction does not solve the question of the existence of causal relation. It is simply a restatement of the original problem in a different form of words.

"The distinction between cause and condition would be valuable, if there were any definite standard for determining what is a cause and what is a condition. The only standard by which this can be deter-

²³ It "has so far expended itself, that its influence in producing the injury is too minute for the law's notice." Bishop, *Non-Contract Law*, §§ 41, 44. And see 9 HARV. L. REV. 84, 85.

²⁴ Hart, J., *Pittsburgh Reduction Co. v. Horton*, 87 Ark. 576, 577, 113 S. W. 647, 648 (1908); *Schoultz v. Eckhardt Mfg. Co.*, 112 La. 568, 36 So. 593 (1904); *Gilman v. Noyes*, 57 N. H. 627 (1876); Lord Dunedin, in *Dunnigan v. Cavan & Lind Mfg. Co.*, 48 Scot. L. R. 459, 461 (1911).

²⁵ In *Palmer v. Concord*, 48 N. H. 211 (1868) the court practically held that the legislature intended to give this definition to the word "caused," as used in a certain statute.

²⁶ It is a mistake to regard the "but for" theory as exactly equivalent to the "theory of the logicians," as stated by Mill. It would seem that the theory of the logicians would render nobody liable. Mill says that all antecedents are equally causes, or rather parts of the cause (the cause being the sum of all the antecedents), and that we have no right to single out any one of them and call it the cause. The "but for" theory adopts Mill's premise; that all antecedents are, in one sense, causes; but, unlike Mill, says that plaintiff may single out any one tortious human antecedent and hold him liable.

²⁷ Mill, *Logic*, 9 Eng. ed., 378-383.

mined is the same as that which determines a proximate from a remote cause; . . . Accordingly, 'condition' or 'occasion,' while affording a convenient verbal distinction, is, in use, likely to mislead thinkers into a conviction that they have something which they have not."²⁸

Pollock says: ". . . the contrast of 'cause' and 'condition' is dangerous to refine upon; . . ." ²⁹

There is an alleged rule, known as the "Last (or Nearest) Wrongdoer Rule," of which Dr. Wharton is an especial advocate.³⁰

This rule is, in substance, as follows:

The legal cause is the last (or nearest) culpable human actor to be found in the chain of antecedents; *i. e.*, the one acting last before, or nearest to, the happening of the damage to plaintiff.

This rule is sometimes propounded, not as a supplement to the rule of liability for probable consequences; but as furnishing, *per se*, a complete and all-sufficient doctrine of legal cause.

Taking this rule literally, the test under it would be to trace back the links in the chain of antecedents,³¹ until we come to a wrongful act of a responsible human being; to the last or nearest wrongful act of a free human agent. The person doing that act is the legal cause, (and *semble* is responsible even though the result could not have reasonably been anticipated).

The above rule is a good working rule to apply in a hurry. In a great majority of cases it gives the correct result. But it will not always do so.

1. The last wrongdoer is not always liable as the legal cause of the damage.

2. Moreover, the last wrongdoer, if himself liable, is not necessarily the only party liable. An earlier wrongdoer may sometimes be suable at the election of plaintiff.³²

²⁸ 1 Jaggard, Torts, 64.

²⁹ Pollock, Torts, 8 ed., 464, note *l*. See also 9 Col. L. Rev. 144, note 23.

³⁰ See Wharton, Negligence, 1 ed., Appendix, bottom paging 823, *et seq.*, also in text, §§ 85-99, and 134-145.

³¹ See Mr. Green's criticism of the phrase "chain of causation," 4 Am. L. Rev. 211, 212.

³² See Watson, Damages for Personal Injuries, § 74. When the damage results from the simultaneous concurrent acts of two independent wrongdoers, neither could escape on the ground that he was not the last wrongdoer.

As to the first point:

If the fault of the nearest wrongdoer is a very remote link in the chain of antecedents, he may not always be considered the legal cause of the damage. The force which he set in motion may be regarded as having become exhausted before the happening of the damage. It may no longer have been potentially operative at the time when the damage occurred; or its effect then may have been infinitesimal. It may have "so far expended itself, that its influence in producing the injury is too minute for the law's notice."³³ The defendant's tort, in order to constitute it a legal cause, must be distinctly traceable as one of the substantial efficient antecedents; as having had a substantial share in subjecting plaintiff to the damage.

This idea is expressed by Professor Beale in the following words:

"One at least of the factors of the act of injury must in a fair sense be due to the defendant. If the force he set in motion has become, so to speak, merged in the general forces which surround us, or in the language of Bishop has 'exhausted itself' like a spent cartridge, it can be followed no further. Any later combination of circumstances to which it may contribute in some degree is too remote from the defendant to be chargeable to him."

"Conceivably, of course, we might resolve every act of injury into its ultimate human forces, and charge each person who had set one of these forces in motion with his share of the act of injury. This would take us back to Adam in every case. Human knowledge is too small to perform such a task with justice, and time too short for the determination by this method of a single case. For their own protection, and for the security of the public at large, the courts refuse to go so far; beyond a certain point the operation of a force is called remote, and is disregarded."³⁴

As to the second point (the possible liability of an earlier wrongdoer).

Suppose that there are two tortious human actors, A. and B., in the chain of antecedents, not acting in concert; that A.'s tort began earlier; and that B.'s tort, which began later, immediately preceded the happening of the damage to the innocent plaintiff and

³³ See Bishop, *Non-Contract Law*, §§ 41 and 44, and 2 Bishop, *New Criminal Law*, § 637.

³⁴ 9 HARV. L. REV. 84-85, and 85, note 2.

was the only force in active motion at the time of the damage. Is B. liable? Can the innocent plaintiff, in any conceivable case, have a right to sue A.? ³⁵

If B.'s tort had a substantial share in bringing about the damage, B., of course, cannot be exonerated on the ground that his tort was, in one sense, "caused" by the earlier tort of A.

But because B. is liable, it does not necessarily follow that A. is exonerated. By the decided weight of authority, A. would be liable if he foresaw, ³⁶ or ought to have foreseen, the commission of B.'s tort, and the resultant damage, as a not unlikely consequence of his earlier tort. This subject will be more fully considered later under the general head of liability for probable consequences. And still later, in discussing the alleged rule of non-liability for improbable consequences, we may advert to the question whether A. may not sometimes be liable, even though the commission of B.'s tort was not a consequence to have been anticipated. ³⁷

³⁵ In many cases it is not correct to speak of A. and B. as "successive" wrongdoers, nor to call A. "the earlier" or B. "the later" wrongdoer. See Clerk & Lindsell, Torts, 5 ed., 519, 522. But for present purposes we here adopt the popular phraseology, and use the words "earlier" and "later"; although A.'s tort, in its effect, may have continued down to the moment of the damage just as much as B.'s tort.

³⁶ If A., when committing his tort, foresees the probability that his tort will induce B. to do tortious damage to X., he is, from one point of view, more guilty than B. A. has done an act which he knew was calculated ultimately to bring harm to X., and also mediate to induce B. to do an unlawful act, whereby B. would incur liability. Why should A., who contemplates the likelihood of causing harm to two parties, X. and B., be excused when B., who contemplates harm to only one party, X., is held liable?

³⁷ What has been said concerns the question of causation when arising in litigation between an innocent plaintiff and one of two independent wrongdoers. But it should be carefully noted that, in a controversy between two negligent wrongdoers, courts are inclined to adopt an exceptional rule of legal cause; differing from the ordinary rule of legal cause which is applied in a suit by an innocent third party against either of said wrongdoers. The term "proximate cause" or "legal cause" is not used in precisely the same sense in fixing defendant's liability to an entirely innocent plaintiff and in fixing a negligent plaintiff's disability to sue a negligent defendant. (This language is based on a statement in Pollock, Torts, 8 ed., 464. See also Fitzgibbons, L. J., in *Devlin v. Belfast Corporation*, [1907] 2 I. R. 437, 457.) Acts of negligence on the part of A. and of B., which would be considered simultaneous (concurrent) in a suit brought against either of them by an innocent third person such as X., are sometimes in a controversy between A. and B. themselves considered not as simultaneous but as successive. One act is considered as ending before the other began; although logically (see Clerk & Lindsell, Torts, 5 ed., 519) the negligence of the "earlier" actor continued down to the moment of the damage. If the negligence of the plaintiff, A., has ceased to operate actively; and the negligence of the defendant B. began to operate later and was in active motion at the time of the damage; then, as between these two negligent parties, A. and B., the negligence of the defendant, B., may be treated as the sole cause

We come now to what is sometimes termed "The Probable Consequence Rule."

This really involves two rules.

The alleged rule, expressed in a single sentence, is that, so far as the question of causation is concerned, a wrongdoer is liable for probable consequences only.

This statement affirms, in effect, two propositions, which are entirely independent of each other.³⁸

1. That if a consequence which actually resulted from defendant's tort was a probable consequence, then defendant cannot escape liability on the ground that his tort was not the legal cause.

2. That if a consequence which actually resulted from defendant's tort was an improbable consequence, then defendant is exonerated on the ground that his tort was not the legal cause.

The first, or affirmative, proposition is sustained in the great majority of cases.

The second, or negative, proposition is the subject of much controversy.³⁹

These two alleged rules deserve separate and careful consideration.

The first alleged rule may be stated more fully as follows:

Whether a wrongdoer is or is not liable for improbable consequences, he must at least be liable, so far as the question of causation is concerned, for all probable consequences.⁴⁰

of the damage ; and hence the action of the plaintiff A. against B. is not barred by contributory negligence.

But see the following criticism of the view last stated : "The above statements, moreover, are open to the objection that they seem to imply that, in the cases to which the qualification applies, there is a succession of negligences in point of time and that the party last negligent is the party really responsible ; but it may be observed that if a man places his person or property in a position of danger, or establishes a state of things which is or may be dangerous to others, his negligence in so creating a source of danger to himself or others continues so long as that source of danger remains unremedied, that is to say, continues down to the very moment of the accident." Clerk & Lindsell, *Torts*, 5 ed., 519.

³⁸ Sometimes it is erroneously implied that the second proposition is a necessary deduction from, or accompaniment of, the first.

³⁹ "The criticisms of the rule apply rather to its alleged restrictive effect than to its affirmative form." It is sometimes "denied that liability should be confined" to probable consequences. Watson, *Damages for Personal Injuries*, 175.

⁴⁰ Under any reasonable interpretation, the term "probable consequences" excludes

Before trying to get at the exact meaning of the word "probable" in this connection, we must give a brief consideration to the compound phrase "probable and natural."

It is not unusual to say that a wrongdoer is liable for all probable *and natural* consequences.⁴¹

If "natural" is here used in the common, but not literally accurate, sense of "probable," then the phrase "liable for all probable and natural consequences" is tautological. If "probable" is taken to mean "foreseeable as not unlikely to occur," and "natural" is construed in its more literal signification, as meaning "occurring in the ordinary course of nature," then the addition of the requisite of naturalness to the requisite of probability might sometimes unjustly absolve a wrongdoer. In the great majority of instances the addition would make no difference. Generally if a result occurs which was probable, it occurs "in the ordinary course of nature." But it is conceivable that a wrongdoer may have foreseen, or ought to have foreseen, that there was likely to be an extraordinary departure from the usual course of nature. Indeed in some cases such an extraordinary departure is in actual and visible progress at the moment of his committing the tort. In such instances, a wrongdoer cannot claim to be exempted from liability for a probable consequence, merely because it did not occur in the ordinary course of nature.

Confusion is sometimes occasioned by lumping together "probable" and "natural" and treating them as synonymous words. Thus in *Hill v. Winsor*,⁴² Colt, J., after saying that the probability that injury in some form would be caused by defendant's act "constitutes negligence, and it is not necessary that injury in the precise form in which it in fact resulted should have been foreseen," added: "It is enough that it now appears to have been a natural and probable consequence."

Upon this statement Professor Bohlen makes the following criticism:

the requisite that the consequences must have been the necessary or inevitable result of the defendant's tort. See Watson, *Damages for Personal Injuries*, § 36.

⁴¹ For various forms of expressing the meaning intended to be conveyed by the phrase "probable and natural consequences," see 36 Am. St. Rep. 809, note; Gaines, C. J., in *Texas & Pacific Ry. Co. v. Bigham*, 90 Tex. 223, 225, 38 S. W. 162, 163 (1896). As to "natural" see 1 Sedgwick, *Damages*, 9 ed., § 138.

⁴² 118 Mass. 251, 259 (1875).

"Is it not a contradiction in terms to say that a thing so improbable that it could not be reasonably foreseen may become probable afterwards, because it does occur? It is natural, if it occurred in the ordinary course of nature, animate and inanimate, but it is not probable, unless it could have in advance been predicted as likely to occur." ⁴³

What is the exact meaning of the word "probable" as used in the alleged rule, *i. e.*, the rule that a wrongdoer is at least liable for all probable consequences.

We submit that the word "probable," when used in laying down a test of duty to use care or when used in the alleged rules affirming or restricting liability for the consequences of a tort, does not carry the full meaning belonging to it when used in charging a jury as to the *quantum* of proof. When the judge tells the jury that the plaintiff must satisfy them that the existence of an alleged fact is probable (that a certain proposition is probably true), he means that the jury must find that the chances (the balance of probabilities) are in favor of the existence of the disputed fact. If the jury find that the chances in favor of its existence are only three out of six (and *a fortiori* if only three out of seven), they must find against the party upon whom the burden of proof rests. But if the chances of harm resulting to plaintiff, in case certain precautions are not taken by defendant, are three out of seven, the jury would often be justified in finding the defendant negligent if he could have taken those precautions and failed to do so. So when the question is one of causal relation it is a mistake to use language ⁴⁴ implying that a consequence in order to be "probable" must be "one that is more likely to follow its supposed cause than it is to fail to follow it." "Probable," both in testing the duty to use care and in the alleged rule as to causation, does not mean "more likely than not," but rather "not unlikely"; or, more definitely, "such a chance of harm as would induce a prudent man not to run the risk; such a chance of harmful result that a prudent man would foresee an appreciable risk that some harm would happen." ⁴⁵ Mr. Watson substitutes "possible of occurrence" for the phrase "likely

⁴³ 40 Am. L. Reg. N. S. 85.

⁴⁴ See such language in *Cole v. German Savings & Loan Soc.*, 124 Fed. 113, 115 (1903).

⁴⁵ See 33 Can. L. J. 717.

to occur." Shearman & Redfield use the words "reasonably possible" instead of "probable."⁴⁶

Other suggestions have been made:

"Not so unnatural and so unlikely to happen that, in the opinion of a reasonable fair-minded man, it would be unjust to impose responsibility upon the defendant."⁴⁷

"Not surprising in the light of average human experience."⁴⁸

"'Probable,' as used in this connection, is a word of very indefinite import. Its range does not end where the chances of occurrence and non-occurrence are equal, but merges intangibly into the merely possible."⁴⁹

"There is an infinity of intermedials between impossibility and certainty. To pass from one to the other, the probability may vary by an infinite number of gradations; and among a hundred assertions there are not perhaps two which represent the same degree of probability."⁵⁰

The term "certainty" can mean nothing more than "a very high degree of probability."⁵¹

"Furthermore, 'probable' consequences include not only those concrete contingencies that are likely to happen, but also those not individually 'probable,' but belonging to a sort of which one or another, in the alternative, may be expected."⁵²

"Damage may be very improbable in itself, and yet be only one of a large number of alternative forms of damage, one or other of which is certain or likely to happen; and in such a case all of these alternatives, by reason of the fact that they are alternatives, are sufficiently natural and probable to be a ground of liability. If I throw a stone into a crowd of a thousand persons, the chances are a thousand to one against hitting any particular individual, yet, in an action brought by one whom I did hit, I could not raise the defense of remoteness of damage."⁵³

If the foregoing views are correct, a meaning which is too narrow has sometimes been given to the word "probable" when used in this connection. Giving greater effect (a wider scope) to the word "probable" in the affirmative rule, that a wrongdoer is liable at

⁴⁶ Watson, *Damages for Personal Injuries*, § 33; 1 *Shearman & Redfield, Negligence*, 5 ed., 28.

⁴⁷ 33 *Can. L. J.* 717.

⁴⁸ 9 *Col. L. Rev.* 139.

⁴⁹ 9 *Col. L. Rev.* 139.

⁵⁰ Quetelet, *Theory of Probabilities*, Eng. ed. of 1849, 3.

⁵¹ See De Morgan, *Essay on Probabilities*, London ed. of 1838, 5.

⁵² Professor Bingham in 9 *Col. L. Rev.* 139, 140.

⁵³ Salmond, *Torts*, 2 ed., 109-110.

least for all probable consequences, will result in correspondingly lessening the scope and effect of the word "improbable" in the negative rule, that a wrongdoer is not liable for improbable consequences.

The rule that a wrongdoer is liable at least for all probable consequences has been sustained in the great majority of cases.

What, if any, exceptions have been claimed or allowed?

The New York courts made an arbitrary exception in case of the spread of fire. They said that there can be recovery only for the burning of the first building ignited; it makes no difference that the burning of the second building was a probable consequence of the burning of the first.⁵⁴

This view is unsustainable on principle; and is opposed to an overwhelming weight of authority.⁵⁵

It has been claimed that the rule — that a wrongdoer is liable for all probable consequences — does not apply to cases where a human actor (a third person) has intervened after the commencement of defendant's tortious act and before the happening of the damage to the plaintiff, and where the damage would not have occurred but for the intervention of such third person. Assuming even that the intervention of the third person could have been foreseen as a probable consequence of the defendant's tort, still it is contended that the defendant is not liable.

If the conduct of the intervener (the third person) was innocent, then his foreseeable non-tortious intervention does not necessarily absolve the defendant, who is, *ex hypothesi*, the only wrongdoer in the chain of antecedents. Innocent and foreseeable human intervention does not necessarily break the causal connection between defendant's tort and plaintiff's damage.⁵⁶

⁵⁴ *Ryan v. New York Central R. Co.*, 35 N. Y. 210 (1866), somewhat modified in *Hoffman v. King*, 160 N. Y. 618, 630, 55 N. E. 401, 404 (1899).

⁵⁵ See *Hoyt v. Jeffers*, 30 Mich. 181 (1874); *Lawrence, J.*, in *Fent v. Toledo, etc. Ry. Co.*, 59 Ill. 349, 357-362 (1871); *Milwaukee, etc. R. Co. v. Kellogg*, 94 U. S. 469 (1876); 5 Ill. L. Rev. 579.

⁵⁶ See 2 Labatt, *Master and Servant*, § 808: "Non-culpable Acts of Responsible Actors." Cf. 33 Can. L. J. 720.

If the conduct of the human intervener was unlawful, but was foreseeable as a probable consequence of defendant's tort, there has been, and perhaps still is, some conflict of authority; but the later authorities are largely one way.

Suppose that there are two "tortious" human actors, A. and B., in the chain of antecedents, not acting in concert; that A.'s tort began earlier; that B.'s tort, which began later, immediately preceded the happening of the damage to the plaintiff and was the only force in active motion at the time of damage; but that the commission of B.'s tort could have been foreseen as a probable consequence of the commission of A.'s tort. Is A. liable, or is the plaintiff confined to a remedy against B.? ⁵⁷

Three classes of cases may arise which differ as to the nature of the unlawful conduct on the part of the intervener.

1. The fault may consist in his breaking a contract which he had made with the plaintiff.⁵⁸
2. The fault may consist in negligent conduct on his part toward the plaintiff.
3. The fault may consist in wilful and consciously wrong conduct on his part toward the plaintiff.

Formerly it would have been held by some courts that the so-called "earlier" tortfeasor was never liable in any of the above three cases, and for this view *Vicars v. Wilcocks*⁵⁹ is the leading authority.

Two grounds are taken:

The first ground is suggested by the trial judge in *Vicars v. Wilcocks*, namely, that plaintiff has a remedy against the intervener (in that instance, an action on the contract to recover damages for his employer's breach of contract); *i. e.*, the fact that plaintiff has a remedy against the "later" actor constitutes a sufficient reason for denying him a remedy against the "earlier" actor.

⁵⁷ In many cases it would not be correct to speak of A. and B. as "successive" wrongdoers, nor to call A. "the earlier" or B. "the later" wrongdoer. See Clerk & Lindsell, *Torts*, 5 ed., 519, 522. But these terms are commonly used.

⁵⁸ "To break a contract is an unlawful act." "A breach of contract is, in itself, a legal wrong." "The form of action for such a wrong is quite immaterial in considering the general question of the legality or illegality of a breach of contract." See Lord Lindley in *Glamorgan Coal Co. v. South Wales Miners' Federation*, [1905] A. C. 239, 253.

⁵⁹ 8 East 1 (1806).

This position is untenable.

"Where it is a question whether A. has been injured by B., it is wholly immaterial whether he has or has not an additional or alternative remedy against C., and it can never lie in the mouth of a wrongdoer, if he is a wrongdoer, to set this up." ⁶⁰

The second, and principal, ground consists in laying down an arbitrary rule of law, founded on an assumption which in many cases is "contrary to manifest truth and fact." There was a tendency to hold that the subsequent voluntary unlawful act of a third person "could not in law, under any circumstances," be deemed the consequence of the tort of an earlier wrongdoer. Another way of expressing this view would be to say that there is a conclusive presumption of law that the earlier tort did not cause the later tort and was not a substantial factor in causing the resultant damage. Damage thus resulting would not be the "legal" consequence of the earlier tort. Hence an earlier tortfeasor could never be liable for damage of which the immediate cause was the later unlawful act of a third person. And this view was maintained irrespective of the question whether the subsequent unlawful act of the third person was or was not a consequence which might have been reasonably anticipated as not unlikely to follow from the commission of the earlier tort, and also irrespective of the question whether the third person's act was or was not induced, directly or indirectly, by the defendant's act.

This view has been crumbling away.⁶¹ It has been pointed out that if the law is to imply in every case that the subsequent voluntary unlawful act of the third party is not the natural and probable result of the earlier tort, "it will be an implication contrary to manifest truth and fact."

"If that were so held in all cases, the law would in some refuse to recognize what is manifestly true in fact." ⁶²

⁶⁰ Bower, *Code of the Law of Actionable Defamation*, 315.

⁶¹ The modern conception is, "that everything, which is, in fact, likely to occur, is legally foreseeable." Professor Bohlen in 56 *Univ. Pa. L. Rev.* 331, note 79.

⁶² See Brett, L. J., in *Bowen v. Hall*, 6 Q. B. D. 333, 338 (1881); Pollock, *Torts*, 8 ed., 242-243, and 330-331. Also the full discussion in Bower, *Code of the Law of Actionable Defamation*, 313-315, and 39, note *d*. See also Watson, *Damages for Personal Injuries*, § 74.

It gradually came to be admitted that the earlier tortfeasor is liable in cases where the commission of the subsequent unlawful or tortious act and the happening of the damage ought to have been foreseen by him as not unlikely to follow. But liability, even in the case of a foreseeable result, was not established without an attempt at an illogical limitation; namely, that liability attached only where the later tort was negligent, and not where it was wilful. A subsequent act of negligence was "supposed to be within the range of reasonable expectation," while intentional misconduct never could be deemed possible.⁶³ This doctrine has been termed a "curious tribute to virtue."⁶⁴ But no such limitation can be reasonably imposed as an arbitrary legal test. Undoubtedly wilful misconduct on the part of third persons is not to be anticipated so often as negligent misconduct. But "in exceptional situations even wilfully wrongful acts of others are normal and expectable."⁶⁵

"It cannot be laid down, as a matter of law, that damage caused by the wilful wrongdoing of a third person can never be the natural and probable result of a wrongful act done by the defendant."⁶⁶

⁶³ See *Watson v. Kentucky & Indiana Bridge & Ry. Co.*, 137 Ky. 619, 633, 126 S. W. 146, 151 (1910); *Mars v. The President, Managers and Co. of the Delaware, etc. Co.*, 54 Hun (N. Y.) 625, 8 N. Y. Supp. 107 (1889).

⁶⁴ See *Mr. Labatt*, in 33 Can. L. J. 719. Cf. *Holmes, L. J.*, in *Sullivan v. Creed*, [1904] 2 I. R. 317, 356.

⁶⁵ Professor Bohlen in 21 HARV. L. REV. 236, note 2. Cf. *Lord Wensleydale*, in *Lynch v. Knight*, 9 H. L. Cas. 577, 600 (1861).

⁶⁶ *Salmond, Torts*, 2 ed., 114.

In a recent opinion the "illogical limitation" we have been commenting upon is attempted to be supported upon substantially the following ground:

The mere negligence of A. and the wilful violence of B., not being wrongs of the same legal nature or on the same legal level, *cannot* contribute so as to become the one proximate cause of injury to a third person. They are incompatible as joint and contributory elements in one and the same proximate cause of an injury. The interposition of the wilful violence is *necessarily* the intervention of a new and independent force, which breaks the causal connection between the negligence and the injury. See *Chytraus, J.*, in *Milostan v. City of Chicago*, 148 Ill. App. 540, 544, 545 (1909) (a case where the wilful violence of B. was not a probable result of the negligence of A.).

For an unconscious *reductio ad absurdum* of the theory that the wilful tort of a "later" wrongdoer always breaks the causal connection between the fault of an "earlier" wrongdoer and the harm to the plaintiff, see the extraordinary *dicta* in *Ross v. Western Union Tel. Co.*, 81 Fed. 676, 677-678 (1897). That was an action under a death statute, where it was alleged that the Telegraph Company negligently delayed delivering a message warning the addressee that armed men were in pursuit of him; and that, in consequence of this delay, he was overtaken and killed by the pursuers. The actual decision in favor of defendant is based on the ground that the Telegraph Company

As we have already said, the view that the earlier wrongdoer can never be liable, not even in case of foreseeability of the tort of the later wrongdoer, is rapidly disappearing. It is, however, to be noted that, while it is not likely that the older doctrine will often be directly reaffirmed by modern courts, yet some modern judges are (unconsciously perhaps) influenced by the old phraseology, and by the exploded arguments in favor of the former view. It is thus only that one can account for the results reached in some modern cases, and for the great reluctance to submit to a jury the question of foreseeability.⁶⁷ Professor Bohlen says that

"the rule of *Vicars v. Wilcocks*, 8 East 1, still occasionally crops up as a refuge to a court wishing in a hard case to relieve some unfortunate rather than morally wrongful delinquent from the extreme burden of full liability for all the actually proximate results."⁶⁸

The old view that the earlier wrongdoer can never be liable persists in only one class of cases. The original utterer of defama-

was not negligent as to the delivery of the message. But the court seem also to take the position that the defendant should be absolved because an entirely new and independent cause, the wilful shooting by the pursuers, intervened to bring about the fatal result. This view overlooks the fact that the danger that the wilful shooting might occur was apparent to the company from the message itself; and was the very danger as to which the message was intended to put the addressee on his guard. The shooting was foreseeable as a not unlikely result of the failure to make prompt delivery. An agency which exists to the knowledge of the defendant at the time of his tort is not such an "intervening" agency as to break causal connection. To have this effect, "it must either come into existence, or [come] within the knowledge of the defendant after the time the [defendant's] alleged negligent act or omission took place." Professor Bohlen, in 40 Am. L. Reg. N. S. 162.

⁶⁷ See, for instance, *Hullinger v. Worrell*, 83 Ill. 220 (1876); *Henderson v. Dade Coal Co.*, 100 Ga. 568, 28 S. E. 251 (1897); *Andrews v. Kinsel*, 114 Ga. 390, 40 S. E. 300 (1901).

⁶⁸ 21 HARV. L. REV. 236, note 2.

"The fact that a third person's wrong contributed to the injury usually does not affect the liability of the wrongdoer. Most of the apparent exceptions to this rule will, I think, be found to depend upon another principle, namely, that in ordinary circumstances one is justified in assuming that others will conduct themselves according to the dictates not only of law, but of morality, justice and reasonableness, and therefore any conduct that is proper on that assumption will not be turned into a wrong by their subsequent failure to do so. The question will not be one of proximate consequences at all, because there will have been no breach of duty . . . But if the circumstances are such as to make it probable that in the particular case others will not act rightly, then the original conduct may be wrongful and the wrongdoer be responsible for consequences happening through such contributory wrong of others." Terry, *Leading Principles of Anglo-American Law*, § 563.

tion is still held not liable for special damage immediately due to repetition by a third person. But this view is supported solely upon authority; being totally indefensible upon principle.⁶⁹

Thus far we have been dealing with the alleged rule that, so far as the question of causation is concerned, a wrongdoer is at least liable for probable consequences.

Now we come to the alleged rule, briefly stated as the rule of non-liability for improbable consequences. A fuller statement, according to our construction of the rule, would be —

that if a consequence which actually resulted from defendant's tort was an improbable consequence, then defendant is exonerated on the ground that his tort was not the legal cause.

This alleged rule is to be considered both as to authority and as to intrinsic correctness.

As to authority.

Many lawyers suppose that the alleged rule, as to non-liability for improbable consequences, is supported by so many decisions that it is now too late to question its intrinsic correctness. But the weight of authority is overestimated. The alleged rule has undoubtedly been enunciated in many cases by reputable judges. But a very large number of these cases cannot be reckoned as actual decisions in point.

First: In a large proportion of these cases the judicial utterances are pure *dicta*. The consequence was probable; *i. e.*, foreseeable as a not unlikely result. Hence the question of liability for improbable consequences was not before the court for decision.⁷⁰

Second: In some cases where the court has exonerated the defendant upon the ground that the causal relation did not exist

⁶⁹ See Mr. Labatt in 33 Can. L. J. 717; Terry, Leading Principles of Anglo-American Law, § 563; Bower, Code of the Law of Actionable Defamation, 302-303, 38, 39 note *d*; 36 Am. St. Rep. 844, note.

⁷⁰ Cases may also be found where the defendant's remote tort was not distinctly traceable as an efficient factor at the time of the happening of the damage. Hence, there was no occasion to decide whether he should be exonerated on the ground that the consequence was an improbable result.

the decision might better have been based upon the ground that the defendant had not committed any tort, as against the plaintiff. There was no duty due, or no breach of any duty, from the defendant to the plaintiff, and therefore no tort. Hence there was no occasion to discuss the subject of legal cause (the relation between the defendant's conduct and plaintiff's damage). The question as to the causative effect of a particular act is entirely distinct from the question of the tortious nature of the same act.⁷¹ In some instances, a defendant might properly be exonerated on the ground that he owed no duty to the plaintiff as to the conduct in question; but if he had owed a duty, he might not justly claim to have his liability limited to foreseeable consequences.⁷²

The defendant may have committed a tort as against a third person; but he may not have violated any duty which he owed to the plaintiff. Suppose that, in such a case, the plaintiff sues for alleged negligence. A decision in favor of the defendant is explainable on the following ground:

"It is not that the injurious act [the damage suffered] is a remote consequence of a wrong done, as is usually said, that the doer escapes, but because in a question with the [alleged] injured party, there has been no negligence. An act is not negligent in itself, but only in respect that it is likely to cause injurious consequences to some determinate person, or one of a determinate class of persons, and an act which is negligent with relation to one person may not be so in relation to another person who is also injured by it."⁷³

Again, the defendant may have owed a duty to the plaintiff, and he may have violated that duty, and the plaintiff may have suffered particular damage. Yet the prevention of the particular consequence of which complaint is made may not have been within the scope of the duty which the defendant has infringed; and, if so,

⁷¹ See Professor Bohlen's Selection of Cases on Torts, Book 2, page 74, note 2; Terry, Leading Principles of Anglo-American Law, § 409, page 399.

⁷² See Terry, Leading Principles of Anglo-American Law, § 543, pages 548, 549; Professor Bohlen in 40 Am. L. Reg. N. S. 151, 157, note; 1 Beven, Negligence, 2 ed., 108.

⁷³ Glegg, Reparation, 34, 35. See also Terry, Leading Principles of Anglo-American Law, § 533. Mr. Glegg here refers to *Renner v. Canfield*, 36 Minn. 90, 30 N. W. 435 (1886), and *Phillips v. Dickerson*, 85 Ill. 11 (1877), which are sometimes cited as bearing on causation. The real *ratio decidendi* in both cases would seem to be, that the defendant had not committed any tort as against the plaintiff. See also 1 Sedgwick, Damages, 9 ed., § 120.

the defendant is not regarded as having tortiously caused that particular damage, and hence is not held liable for it.⁷⁴ The defense here suggested does not raise a "question of remoteness of consequence, but a question of definition of duty." The defendant does not escape upon the ground that his conduct did not sustain a causal relation to plaintiff's damage, but upon the ground that the prevention of that particular kind of damage "is not within the limits of any duty that defendant has infringed."⁷⁵

Third: There are some opinions which "betray a confusion of the principles of 'legal cause' with those underlying the requirements concerning certainty of proof. . . ."⁷⁶ Suppose that plaintiff has failed to make out by preponderance of evidence that defendant's tort was, in fact, the cause of plaintiff's damage.⁷⁷ Then the case should be decided on the short ground that plaintiff has failed to establish the existence of causal relation; and there is no occasion for the court to say whether, if that relation had been made out, they would nevertheless have denied recovery on the ground that the damage, even though it actually resulted, was improbable. Yet cases of this sort may be found where the court appear to base the decision upon the alleged rule that the improba-

⁷⁴ "If a statutory duty be imposed solely in order to prevent damage of one particular kind, no action will lie for such breach of it as only causes damage of a different kind." Headnote in *Kenny's Cases on Torts*, 15, to the case of *Gorris v. Scott*, L. R. 9 Exch. 125 (1874).

⁷⁵ See 9 Col. L. Rev. 26, 27, 34, 35, 154; Terry, *Leading Principles of Anglo-American Law*, § 528. This view is very clearly stated in Professor Bingham's two articles in 9 Col. L. Rev. 16, 136, entitled "Some Suggestions concerning 'Legal Cause' at Common Law."

⁷⁶ 9 Col. L. Rev. 36.

⁷⁷ As to the *quantum* of proof required, it has been said that the consequence must be traceable to the defendant's act "with reasonable certainty," or "with sufficient certainty." See Terry, *Leading Principles of Anglo-American Law*, §§ 410, 551, 352, 550, 355. What constitutes "reasonable certainty" or "sufficient certainty" of causal connection between defendant's tort and plaintiff's damage? We submit that it is sufficient if the jury find, upon reasonable grounds, that it is more probable than otherwise that the defendant's tort caused the plaintiff's damage. See *Parsons, C. J.*, in *Boucher v. Laroche*, 74 N. H. 433, 434, 68 Atl. 870, 871 (1908). Suppose that A. sues B., alleging that B. struck him, and that the wound resulted in blood poisoning. To prevail on the issue as to the striking of the blow, A. has only to prove his case on the balance of probabilities. Why should any higher degree of certainty, or larger quantity of proof, be required on the issue as to the consequences resulting from the blow? In *Allison v. Chandler*, 11 Mich. 542, 555 (1863), *Christiancy, J.*, said: ". . . we can see no good reason for requiring any higher degree of certainty in respect to the amount of damages, than in respect to any other branch of the cause."

bility of a consequence bars recovery for any damage, even though it was actually caused by defendant's tort. Certainly such opinions ought not to be counted as authorities in favor of the alleged rule.

"Whenever a requisite to maintenance of a plaintiff's claim or any part of it cannot be established with sufficient certainty, the plaintiff fails *pro tanto*; but because of the principles concerning certainty of proof, not because of any principle of proximate cause."

It is only when "the connection of cause and consequence has been established," as matter of fact, that the court can be called upon to consider whether they should adopt a rule arbitrarily limiting recovery.⁷⁸

The "confusion" above referred to is illustrated by a passage in Professor E. C. Clark's *Analysis of Criminal Liability*,⁷⁹ in which that able writer gives the following as an instance of "over-remoteness":

"Evidence was too slight to convict for manslaughter, where the prisoner had struck a light and lighted a candle, contrary to ship's regulations, and thrown down the lighted match, but six hours elapsed without sign of fire by sight or smell: . . ." ⁸⁰

But the decision referred to does not proceed upon the ground that the defendant's act was too remote an antecedent. It is based on the ground that there was not sufficient evidence to show that it was a causative antecedent at all. It is not a case of a cause too far removed, a cause having too little effect; but a case where plaintiff failed to prove defendant's act to be a cause at all.

Fourth: Many cases, where the opinion seems to favor non-liability for improbable consequences, are actions for breach of contract. But cases laying down a restrictive rule of legal cause in actions for breach of contract are not necessarily authorities for a similar limitation of liability in actions of tort.

The better view is that there is, in this respect, a material distinction between these two classes of actions. In contracts, the relation is entered into voluntarily; the plaintiff selected the person with whom to make his agreement; he could have refused to

⁷⁸ See 9 Col. L. Rev. 36, note 39; Terry, *Leading Principles of Anglo-American Law*, § 550.

⁷⁹ On p. 17, note 22.

⁸⁰ Referring to 1 Russell, *Crimes and Misdemeanors*, 841, which cites *Regina v. Gardner*, 1 Fost. & Finl. 669 (1859).

enter into the relation at all unless there was a satisfactory stipulation as to damages in event of non-performance; or he could call to the other party's attention certain facts rendering it probable that certain special damages would result from non-performance. In view of these considerations, the courts are inclined to restrict the damages to such as were within the contemplation of the parties (or better, "such consequences as the parties, if they had looked forward to the consequences of non-performance, would have contemplated as likely to follow").

The case of a tort differs widely. Here the relation is not entered into voluntarily. The plaintiff has no chance to stipulate as to damages recoverable; nor has he generally an opportunity to give notice, before the commission of the tort, of any special circumstances likely to enhance the damages.⁸¹

But even though we leave out of consideration the foregoing classes of cases, there remains a good deal of authority in favor of the alleged rule of non-liability for improbable consequences. There are many cases where this rule has furnished the basis of decision, but frequently without any examination of its intrinsic correctness; instances of "law taken for granted." The decisions, however, are by no means unanimous. There are not wanting cases where the courts squarely reject the alleged rule. The leading English case in this direction is *Smith v. London & S. W. R. Co.*⁸² As leading American cases to the same effect, we may cite *Christianson v. Chicago, etc. Ry. Co.*,⁸³ *Stevens v. Dudley*,⁸⁴ and *Isham v. Dow*.⁸⁵ There is also the earlier and very able opinion of Wardlaw, J., in *Harrison v. Berkley*,⁸⁶ where, however, the actual decision did not turn upon this point.

⁸¹ As to these distinctions, see Professor Bohlen in 40 Am. L. Reg. N. S. 80-82; Terry, *Leading Principles of Anglo-American Law*, § 552, and see also §§ 553, 554; Innes, *Torts*, Pref. xii, xiii; Christiancy, J., in *Allison v. Chandler*, 11 Mich. 542, 551, 555 (1863); 1 Beven, *Negligence*, 3 ed., 105, 106; Pigott, *Torts*, 164; 1 Sedgwick, *Damages*, 9 ed., § 141.

⁸² L. R. 6 C. P. 14 (1870).

⁸³ 67 Minn. 94, 69 N. W. 640 (1896).

⁸⁴ 56 Vt. 158 (1883).

⁸⁵ 70 Vt. 588, 41 Atl. 585 (1898). And see Earl, J., in *Ehrgott v. Mayor of New York*, 96 N. Y. 264, 280, 281 (1884).

⁸⁶ 1 Strob. L. (S. C.) 525, 548-549 (1847).

Among legal authors there is a division of opinion.

The alleged rule is sustained by the high authority of Pollock, Cooley, and Salmond; but Salmond's support seems to be given only in deference to the supposed weight of authority.⁸⁷ This rule "reasonably stated and reasonably applied" is adopted by Mr. Watson in his *Damages for Personal Injuries*.⁸⁸

On the other hand, the rule is opposed by Beven, Bohlen, and Street, in passages to be referred to hereafter. It is also opposed in the second edition of Mr. A. G. Sedgwick's *Elements of the Law of Damages*,⁸⁹ and in the forthcoming ninth edition of Sedgwick on *Damages*.⁹⁰

Upon the question what the law *ought to be*, the opinion of codifiers is entitled to consideration. The Civil Code of California, § 3333, contains the following provision:

"For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."⁹¹

In this connection attention may be called to the judicial interpretation of such words as "results," "causes," and "produces," in statutes imposing absolute liability irrespective of fault; or imposing liability for violation of a duty imposed by statute. It has in various instances been held that such general words include improbable consequences; *i. e.*, the defendant is liable if damage in fact resulted; irrespective of the question whether such result might have been reasonably anticipated.

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[To be continued.]

⁸⁷ See Pollock, *Torts*, 8 ed., 32; Cooley, *Torts*, 2 ed., 74, note 1; Salmond, *Torts*, 2 ed., 105.

⁸⁸ At p. 174. Judge Jaggard, 1 *Torts*, 372, thinks that the American courts have not determined very definitely as to this test. Professor Dicey says: "The principle that a person is not liable for results which do not flow naturally from his acts, must be applied with great caution." Dicey, *Parties*, 411.

⁸⁹ At p. 50.

⁹⁰ Vol. I. §§ III c and III e.

⁹¹ Cal. Civ. Code, Deering's ed. (1886). See also §§ 1427, 1428, 1708, 1714. Contrast § 3300 as to damages for breach of contract.

WORKMEN'S COMPENSATION ACTS: THEIR THEORY AND THEIR CONSTITUTIONALITY.

OF late there has arisen a new answer to the old question: When a workman in the course of his employment, and because of it, is killed or merely disabled, who should bear the financial loss? Obviously the physical burden must be borne by the workman himself, however much it may be reduced by hospitals and the like; but what shall be said of that part of the burden which is easily capable of translation into dollars and cents — including the financial equivalent of lost time?

The question has been active for about seventy-five years. For the first sixty years there was heard in countries using the Anglo-American system of law practically only one answer, — one based on decisions.¹ But now for about fifteen years these countries have been giving occasionally a new answer, — one embodied in statutes which have had their origin on the continent of Europe.

The old answer depended much upon ascertaining who was at fault. If the employer were at fault, he might be responsible; and so too in case the employer, though not personally to blame, had delegated to someone a duty which is really incapable of delegation, — for example, the duty of seeing that a competent person uses proper diligence in supplying reasonably safe appliances, — and the person to whom he delegated this duty actually neglected it and thus caused the casualty. Yet even in these cases of actual or imputed negligence the employer might escape, for he would not be responsible if the injured workman assumed the unnecessary risk voluntarily, nor if the result was wholly or partly caused by that injured workman's own negligence. When there was no actual or imputed negligence of the employer, the burden necessarily fell upon the injured man, for the casualty must then be a mere accident foreign to the employment, or a mere incident of the employment and hence contemplated and assumed by the work-

¹ See *Priestley v. Fowler*, 3 M. & W. 1 (1837); *Murray v. South Carolina R. Co.*, 1 McM. (S. C.) 385 (1841); *Farwell v. Boston & Worcester R. Corporation*, 4 Met. (Mass.) 49 (1842).

man, or a result, at least partly, of the workman's own negligence. The old answer, then, laying stress upon the assumption of both the ordinary risks of the employment and the known extraordinary risks, and also upon contributory negligence, was, and, unless changed by statute, still is, that when the casualty is due to an ordinary or a known risk, — for example, the negligence of a fellow-servant, — or wholly or partly to the negligence of the person injured, then the financial burden rests wholly upon the workman and upon those dependent upon him.

The new answer, on the other hand, knows nothing of distinctions based upon the employer's obliquity, nothing of the assumption of risk, — including the fellow-servant rule, — and very little as to the negligence of the injured man himself. The new answer is, in short, that there is to be indemnity in every case where the casualty is incident to the employment, unless, indeed, the casualty is brought to pass by the injured man's wilfulness.

The economic basis of the old answer includes a theory that the workman receives a compensation which takes into account the dangers of the employment, and that thus the amount of the risk passes into the price of the things made by the employer, so that this burden is borne eventually by the customer and not by the workman.

The new answer, on the other hand, is based upon a belief that the old economic theory is at variance with facts, that the workman even in very dangerous employments — like mining — does not receive extraordinary compensation, that the amount of the risk does not appear in the price of the articles produced, and that the burden of a casualty if placed primarily on the workman is borne by his dependents or by charitable neighbors or by public charities, and is eventually in one way or another thrust indirectly upon the public, — the general public, not the public peculiarly benefited as consumers or the like by the production of the goods representing among other things the work of the person injured or imperilled.

Thus there has arisen the new answer, to the effect that the pecuniary burden should be borne not even primarily by the workman; that casualties are an essential feature of industrial undertakings, necessarily recognized as such by both workmen and employers; that this is true even of the negligence of fellow-ser-

vants and of the workman himself; that the workman, especially in large undertakings, does not have it in his power to modify the conditions of his service; that the effective force in creating and managing the employment is the employer; that the work is undertaken primarily in the interest of the employer and ultimately in the interest of the public; that the employer can easily transfer to the customer the necessary pecuniary equivalent of any risk; that, whatever the primary method of placing the burden, the loss, whether by death or by disablement, will be borne eventually not by the workman but by society; and that the workman's injury should be relieved without the intervention of charity and on the contrary with a recognition of this relief as a right equivalent to a soldier's right to a pension.

The new answer is the one underlying workmen's compensation acts. The acts, it is true, contain many diversities in detail. The most important diversity is that in some countries, including Germany² and Austria, the compensation of the injured workman is paid through an insurance scheme to which both workmen and employers contribute, whereas in most countries, including England and France, the compensation is paid directly by the employer, — the economic theory in either case being that through enhanced price the burden passes eventually to that part of the public which is peculiarly benefited.

As has been said, the foundation of workmen's compensation acts is the new answer as to the proper initial incidence of the pecuniary burden resulting from injury. Yet it would be a mistake to think that the mere destruction of the old answer is enough to create a workmen's compensation act. No, there is another element, and one so important that it is what has given rise to the title by which the acts are known; and this is the displacing of the old rather blind verdict of a jury as to the pecuniary amount of the damage, and the substitution of a definite sum to be determined by the unfortunate workman's wages and hence with greater accuracy to be termed compensation. There is still another element, though one not absolutely essential; and this is the creation

² The insurance feature of the German statute is far from being its most important point; but it has naturally been emphasized by laymen discussing the statute, and thus the attention of American lawyers was not immediately directed to the bearing of this statute upon questions as to assumption of risk and contributory negligence.

of a simple procedure, whereby the recovery may be prompt, cheap, and non-litigious.

To repeat, then, the essential features of a workmen's compensation act are that in case of injury to a workman in the course of his employment there is indemnity dependent upon the amount of his wages and independent of considerations as to contributory negligence — save in extreme cases — and as to assumption of risk. The diversities in form do not disguise the truth that underlying each workmen's compensation act is the same matter of substance, — the disappearance of assumption of risk and the minimizing of contributory negligence. Back of all this is the one theory, — the new and already almost world-wide theory that industrial risks should be perceived by society to be inseparable accompaniments and expenses of industrial enterprises.

It was in Germany, in 1884, that the first workmen's compensation act was adopted, and now this new body of doctrine has swept over almost the whole of Europe and of the British colonies, a total of more than two dozen jurisdictions,³ and has entered upon a legislative career in the United States, already resulting in about half as many state statutes.⁴

³ According to Bulletin No. 90 (September, 1910) of the United States Bureau of Labor, pp. 723-748, the workmen's compensation acts outside the United States, together with the dates of first enactment, are: Germany (1884); Austria (1887); Norway (1894); Finland (1895); Great Britain (1897); Denmark (1898); Italy (1898); France (1898); Spain (1900); New Zealand (1900); South Australia (1900); New South Wales (1901); Netherlands (1901); Greece (1901); Sweden (1901); Western Australia (1902); Luxembourg (1902); British Columbia (1902); Russia (1903); Belgium (1903); Cape of Good Hope (1905); Queensland (1905); Hungary (1907); Transvaal (1907); Alberta (1908); Quebec (1909). The statutes in force in those twenty-six jurisdictions in 1909 are summarized in the same place.

⁴ The workmen's compensation acts in the United States have been: New York in 1910; and, in 1911, ten states or more, Washington and Kansas adopting statutes on the same day, then Nevada, New Jersey, California, New Hampshire, Wisconsin, Illinois, Ohio, and Massachusetts. Session laws of many states are not yet accessible.

The United States and several of the states have appointed commissions to study the subject.

It is to some extent a question of opinion whether certain statutes should be classed as workmen's compensation acts. Some of the legislative provisions showing a gradual approach toward the workmen's compensation acts of the present day must now be noticed.

More than fifty years ago, statutes modifying the fellow-servant rule began to be adopted. Such statutes sometimes have applied to railways only. See *Ga. Acts of 1855-56*, p. 155. Others, following closely the provisions of the British Employers' Liability Act of 1880, have had a wider application. Further, in 1901 Colorado abol-

And how about constitutionality?

In the absence of prohibitions in the state and federal constitutions, the legislative powers of state legislatures have no limit.

The only provision in the Constitution of the United States which can be used as the basis of an attack upon the state statutes in question is the Fourteenth Amendment: "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The meaning of these phrases is not as clear as one could wish; but for the present purpose the indefiniteness of meaning causes no difficulty, for it must be agreed that under the authorities the employer is deprived of life, liberty, or property by being compelled to assume this new liability as an incident of carrying on his business, and that the deprivation is fatal in case it can be fairly termed novel and unreasonable.

Persons who argue that the new liability is novel and unreasonable say truly that workmen's compensation acts place upon the employer a burden, at least in a preliminary way, for an accident which may be wholly inevitable. It is then alleged that it is con-

ished the fellow-servant rule entirely. See Colo. Sess. Laws, 1901, c. 67. Yet these statutes contained no provisions as to measuring compensation, and hence they cannot be counted as workmen's compensation acts.

In 1902 payment through compulsory coöperative insurance was provided by Maryland in two statutes applicable to a few employments. One of these statutes was overthrown because of its improper delegation of judicial functions. Another statute with restricted application was adopted in 1910. In these statutes, indemnity was not determined by wages; and thus there is a diversity from workmen's compensation acts in the strict sense. See Md. Laws of 1902, cc. 139 and 412, and Md. Laws of 1910, c. 153.

In 1905 the Philippine Commission enacted that employees of the Insular Government, including laborers, who were injured in the clear line of duty, might continue to receive their regular compensation for ninety days, in the discretion of two designated officials. See Act No. 1416, § 6, in 5 Public Laws Enacted by Philippine Comm. 103, 158. This provision was contained in an annual appropriation bill, and it permitted payments out of the appropriation for that year. It was repeated in other annual appropriation bills. It was not equivalent to a workmen's compensation act, for it gave no absolute right, and, besides, it was simply a provision as to the employees of the enacting power, — in short it was much like the gifts which any employer makes to his workmen. Further, the United States statute of 1908, applicable to artisans and laborers employed by the United States, cannot be called a workmen's compensation act, partly for the reason that it applies only to employees of the enacting power, and partly because it excludes injuries due to the negligence or misconduct of the employee. See 35 U. S. Stats. at Large 556.

trary to the spirit of our system of law to place legal responsibility upon a person who is without negligence or other fault.

This allegation is wholly unsound. Trover, trespass, slander, and libel are ancient parts of our law; and moral obliquity is no part of any one of them. To come closer to the very sort of liability, an employer, however innocent, may be liable for the wrongs committed by his servant upon a stranger. To come still closer, the employer, however innocent, is liable to his employee for injuries to that employee by reason of the failure of another employee to use due diligence in furnishing appropriate appliances and the like. It would be easy to give a long list of civil liabilities placed by our system of law upon men who are wholly blameless; but the list already given is long enough to demonstrate that even the most innocent and the most careful may incur civil, as distinguished from criminal, liabilities.

What, then, is meant by the persons who make the mistaken allegation that our law does not create a liability for a man who is not at fault? Doubtless they mean that our law does not create a liability for a person who is wholly outside the chain of causation. That may be true; but the employer with whom workmen's compensation acts have to do is not outside the chain of causation which results in the casualty. The employer has voluntarily participated in creating the relation of master and servant as to this business enterprise. Certain dangers, including negligence of the workman and of his fellow-servants, are inevitable as a business proposition. A man who plans a suspension bridge or a tunnel, for example, knows that experience tables tell in advance almost as well as after the fact how many lives must be lost. Both employer and employee by entering upon an enterprise in company assent for their own business purposes to the creation of a relation which will inevitably result in accidents and will thus cast burdens upon society. To say that either one of those two persons is outside the chain of causation is wholly inaccurate. Both parties are coöperating in the creation of the dangerous relation which results in the casualty. In a sense, then, there is no wholly innocent man in the transaction. The law — by judicial decision — used to place the preliminary burden upon one of them — upon the workman. The law — by the new statute — now places the preliminary burden upon the other.

And why not? Here is simply the shifting of a burden from one to the other of the two persons who have innocently, though selfishly, entered into the dangerous relation and have coöperated thus in causing the casualty.

The new statute, then, is not guilty of the novelty of placing a responsibility upon a person outside the chain of causation. In placing the responsibility upon one of the persons in the chain rather than upon the other, is the new statute outrageous? In the light of the compensation movement to which almost all the chief nations of the world have been parties, such an allegation is impossible.

Hence, even without insisting that the new statute tends to prevent poverty and to encourage the introduction of safety devices and to promote good will, ordinary legal reasoning proves that the shifting of the burden is constitutional; although, to be sure, these considerations just now named, based upon the police power, stand in the background ready to serve as reinforcements in case of need.

When one passes to the other essential element of the new statute, the mode of computing the amount of indemnity, one finds that the easiest course is to insist that this computation, even if it deprives the parties of the computations heretofore made by juries, is reasonable in itself and is a proper incident to be annexed to the privilege of engaging, either as employer or as workman, in enterprises involving the danger of burdening society. Obviously this is a direct appeal to the police power.

Thus familiar legal reasoning upholds the constitutionality of the statute.

The decisions, however, are as yet scanty and conflicting. In New York a workmen's compensation act has been overthrown. In Massachusetts one has been sustained. One has also been sustained in the state of Washington. These decisions — all of them in 1911 — deal with statutes of diverse forms.

In *Ives v. South Buffalo Railway Co.*⁵ the New York Court of Appeals overthrew a statute⁶ which became law June 25, 1910, and took effect September 1, 1910. This statute applied to only specified employments, described in it as especially dangerous. It

⁵ 201 N. Y. 271, 94 N. E. 431 (1911).

⁶ N. Y. Laws of 1910, c. 674.

provided that the employer should be liable to pay certain compensation in case persons engaged in manual or mechanical labor in those employments should suffer in the course of the employment a bodily injury by an accident arising out of the employment and in whole or in part caused by a necessary risk of the employment or by negligence of the employer or of any of his employees. There was an exception of injuries caused in whole or in part by "the serious and wilful misconduct" of the injured workman. The compensation was dependent upon wages; and in case of death account was taken of the nearness and number and degree of dependence of those who had been supported by the deceased. It was provided that not more than the actual damage should be recoverable, and also that there should be an election between the old remedies and the claim under the statute. It was agreed that the employments covered were really of an unusually hazardous nature and that thus there was not an arbitrary discrimination. The statute was overthrown under a provision of the state constitution,⁷ similar to the Fourteenth Amendment, and worded thus: "No person shall be . . . deprived of life, liberty, or property, without due process of law." The decision was placed squarely upon the ground that "When our Constitutions were adopted it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another."⁸

This is in absolute conflict with the line of reasoning developed in the present article. However, the point was one of first impression. Besides, it should be noticed that perhaps the decision can be upheld upon a ground not taken by the court. The theory of workmen's compensation acts, it must be borne in mind, is that the pecuniary burden placed upon employers is merely preliminary and is to be shifted ultimately to consumers by increases in price. In so far as there are outstanding contracts for supplying goods and the like, there can be no shifting. It was probably unreasonable, therefore, to attempt to make the New York statute take effect in less than ten weeks. In Germany, Great Britain, and France there was a postponement of about one year, and in Austria of about two years. Conceivably the hardships incident to the promptness of the New York statute had some effect upon the court's view of the statute's reasonableness.

⁷ Art. 1, sec. 6.

⁸ Opinion of the court, *per* Werner, J., p. 293.

In The Opinion of the Justices,⁹ the Supreme Judicial Court of Massachusetts assured the Senate of the constitutionality of an act¹⁰ which was approved July 28, 1911, and which, as to its possibly burdensome features, takes effect July 1, 1912. This statute, applicable to all workmen except domestic servants and farm laborers, abolishes the defenses of contributory negligence and assumption of risk, — including the fellow-servant rule, — and gives for a casualty not due to the workman's own "serious and wilful misconduct" a compensation regulated by wages and by the degree to which persons are dependent upon the injured workman; but it leaves for the workman the option of recovering a common-law measure of damages, in case he gives notice upon entering the employment, and it offers to the employer the option of relieving himself from direct payment of the statutory compensation, in case he procures insurance in behalf of his workmen. The New York act offered to the employer no option. The Massachusetts act gives to the employer the option on the one hand to be directly liable for the casualties covered by the act, including casualties as to which the employer is blameless, and on the other hand to pay to an insurance company the premiums for assuming the same liability. Here is a distinction, to be sure, and the court naturally enough calls attention to the distinction, saying: "In this respect the act differs wholly so far as the employer is concerned from the New York statute."

Yet the distinction seems to be one without a difference. The New York statute gave to the employer a Hobson's choice, — either he must stay out of the business or he must assume the statutory liability. The Massachusetts statute gives one more option; but the new option is also burdensome. "Your money or your life," says the highwayman; and no one imagines that the choice offered causes the money to be a gift or the highwayman to be an honest man. So here, when the Massachusetts court upholds the statute it upholds the compulsion placed upon the employer to assume a burden for casualties of which he is morally innocent; and thus the Massachusetts decision is indistinguishably opposed to the one in New York.

In State *ex rel.* Davis-Smith Co. v. Clausen¹¹ the Supreme Court

⁹ 209 Mass. 607, 96 N. E. — (1911).

¹⁰ Mass. Laws, 1911, c. 751.

¹¹ 117 Pac. 1101 (1911).

of Washington upheld an act ¹² of March 14, 1911,¹³ whereunder for injuries to workmen in extra-hazardous occupations, regardless of questions of fault, — save instances in which the workman himself had “the deliberate intention” to produce the so-called casualty, — there shall be compensation, according to a schedule, from a state industrial insurance fund maintained by contributions from employers, the contributions being dependent upon wages paid and the seriousness of the hazard. The court expressed its approval, though unnecessarily, of the method whereby workmen’s compensation acts measure the amount of indemnity. The important point, however, was the approval of the burden placed upon employers. As to this the court was emphatic, relying largely on the police power. The court expressly disapproved the New York decision, saying: “The act the court there had in review is dissimilar in many respects to the act before us, and is perhaps less easily defended on economic grounds. The principle embodied in the statutes is, however, the same; and it must be conceded that the case is direct authority against the position we have here taken.”

In the Supreme Court of the United States there has been no decision exactly in point. There have been, to be sure, several decisions upholding the power of the state ¹⁴ and the federal ¹⁵ governments, within their respective spheres, to destroy the fellow-servant rule and the defense of contributory negligence, notwithstanding the due process provisions of the Fourteenth and the Fifth Amendments. Further, there appear to be no decisions upholding the conception that the creation of a civil liability requires someone to be morally at fault. On the contrary, there are decisions which give argumentative support to the propositions that our system of law is satisfied if the person held responsible is in the chain of causation, and that a person places himself in this chain whenever he voluntarily enters into an undertaking which, though lawful in itself and conducted carefully by him, results in damage to another. Thus, there has been a decision upholding the power of the states to compel railways, though not negligent, to

¹² Wash. Session Laws, 1911, c. 74.

¹³ This act did not affect causes of action existing on or before September 30.

¹⁴ *Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161 (1888); *Tullis v. Lake Erie & Western R. Co.*, 175 U. S. 348, 20 Sup. Ct. 136 (1899).

¹⁵ *El Paso & Northeastern Ry. Co. v. Gutierrez*, 215 U. S. 27, 30 Sup. Ct. 21 (1909).

pay for fires caused by their locomotives;¹⁶ but this decision may be subject to the comment that an extraordinary liability has long been recognized as to a harbinger of fire. There is also a very recent decision¹⁷ that Congress can compel a carrier engaged in interstate commerce, and receiving merchandise for interstate transportation beyond its line, to pay for a loss to such merchandise even though the original carrier be free from negligence and the loss be caused by a later carrier on the specified route, and even though the bill of lading attempted to exclude this liability. As has been said, the decisions of the Supreme Court of the United States do not cover the very question as to workmen's compensation acts; but certainly they indicate with sufficient clearness this court's view that on the one hand due process of law does not require the perpetuation of old doctrines as to assumption of risk and contributory negligence, and that on the other hand due process of law includes, at any rate in civil cases as distinguished from criminal, no requirement of negligence or moral obliquity.¹⁸ Nothing in the decisions of the Supreme Court of the United States appears to prevent legislative bodies from shifting the primary incidence of the financial burden of an employee's accident from the employee himself to the employer, — that is to say, from one to the other of the two persons who jointly enter upon the industrial undertaking and who thus participate in creating the situation out of which will come the casualty and the resultant loss to society.

The conclusion, then, is that, whether workmen's compensation acts are desirable or not, their essential features, both by reason and by the weight of decision, are constitutional. Apparently in large industrial enterprises the fellow-servant rule, assumption of risk, and contributory negligence are under sentence of death. That is a matter for the statesman and the legislator. To the mere lawyer it is clear enough that these old defenses are not rendered invulnerable and immortal by the Constitution of the United States.

Eugene Wambaugh.

HARVARD LAW SCHOOL, NOV. 10, 1911.

¹⁶ *St. Louis & San Francisco Ry. Co. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. 243 (1897).

¹⁷ *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164 (1911).

¹⁸ Numerous state decisions to the same general effect are cited in *State ex rel. Davis-Smith Co. v. Clausen*, *supra*; but, like the decisions in the Supreme Court of the United States, they do not deal directly with workmen's compensation acts.

THE SCOPE AND PURPOSE OF SOCIO- LOGICAL JURISPRUDENCE.¹

[Continued.]

II.

5. THE SOCIAL UTILITIARIANS.²

A RADICAL change in jurisprudence began when the social utilitarians turned their attention from the nature of law to its purpose. On this account, the work of the leader of this group, Rudolf von Jhering (1818-1892), is quite as epoch-making as that of Savigny. A great Romanist, Jhering saw, none the less, the futility of the jurisprudence of conceptions which the historical school had built upon the classical Roman law, and stood for a jurisprudence of actualities.³ Moreover, legislation was developing steadily in Germany as a living organ of the law, and this development was refuting a fundamental position of the orthodox historical jurisprudence. Not unnaturally, therefore, just as the Benthamian theory of law, which is really a theory of legislation,⁴ is utilitarian, Jhering's philosophical standpoint was teleological.⁵ Since life is governed by purpose, he held that the science of collective life must employ primarily a teleological method.⁶ It is not enough, he

¹ The first paper, 24 HARV. L. REV. 591 *et seq.*, treated of schools of jurists and methods of jurisprudence. This paper, continuing that discussion, takes up the social-philosophical jurists in their relation to sociological jurisprudence.

² Sternberg, *Allgemeine Rechtslehre*, I, 188-194; Berolzheimer, *System der Rechts und Wirtschaftsphilosophie*, II, § 84; Merkel, *Gesammelte Abhandlungen aus dem Gebiet der allgemeinen Rechtslehre und des Strafrechts*, II, 733, 744 *et seq.* For critiques of their views, see Berolzheimer, *Rechtsphilosophische Studien*, 143 *et seq.*; Stammler, *Wirtschaft und Recht*, 578-584; Stammler, *Lehre von dem richtigen Rechte*, 191 *et seq.* See also Korkunov, *General Theory of Law* (Hastings' transl.), §§ 13-14.

³ Scherz und Ernst in der *Jurisprudenz*, 1 ed. (1884), 9 ed. (1904).

⁴ Maine, *Early History of Institutions*, Lect. XII and last paragraph of Lect. XIII.

⁵ Der *Zweck im Recht*, Vol. I, 1 ed. (1877), 2 ed. (1884), 3 ed., posthumous (1893); Vol. II, 1 ed. (1883), 2 ed. (1886), 3 ed., posthumous (1898); 4 ed., both volumes (1905).

⁶ Cf. Paulsen, *Introduction to Philosophy* (Thilly's transl.), xv, arguing that "ethics

conceived, for the jurist to know that law is a development; he must perceive not merely how it has developed, but for what purpose and to what end. He is not to draw the conclusion that legal doctrines and legal institutions are to be left to work themselves out blindly in their own way. They have not so worked themselves out in the past, but have been fashioned by human minds to meet human ends. For, he says, while we explain events of external nature by "because," human acts are explained by "in order to"; and this "in order to" in the case of the human will is as indispensable as the "because" in the case of a physical object. Hence the law of cause and effect as applied to the human will, that is, the psychological law of cause and effect, is a law of purpose.⁷ Upon this basis he builds an utilitarian philosophy of law, challenging the then philosophical position at the outset. "The sense of right," he says, "has not produced law, but law the sense of right. Law knows but one source — the practical one of purpose."⁸ In other words, whereas the philosophical jurist, adopting an idealistic interpretation of legal history, considered that principles of justice and right are discovered and expressed in rules, and the historical jurist taught that principles of action are found by experience and developed into rules, Jhering held that means of serving human ends are discovered and are fashioned consciously into laws.

All exposition of the doctrines and achievements of the social utilitarians must take account of Jhering's personality. It has been said of him that he was predestined to be a jurist, that "he was a jurist by the grace of God."⁹ He saw the juristic possibilities of the most trivial events and transactions of every-day life.¹⁰ He was born with a sense of right and justice which proved a complete compensation for want of practical training and enabled him on occasion to overcome not merely grave theoretical doubts but even the consensus of authority among civilians. In contrast with his great contemporary, Windscheid, it has been said that legal convictions were intuitions with the one, but the result of

and sociology, jurisprudence and politics, are about to give up the old formalistic treatment and to employ instead the teleological method."

⁷ *Der Zweck im Recht*, 4 ed., I, 3-25.

⁸ *Id.*, I, xiv.

⁹ Eck, *Zur Feier des Gedächtnisses von B. Windscheid und R. v. Jhering*, 11 (1893).

¹⁰ See his *Law in Daily Life* (transl. by Goudy).

regular theoretical deductions with the other.¹¹ In consequence, Jhering makes a great deal of the sense of right and justice that is in all of us,¹² and his view as to the administration of justice according to law calls for exercise by the magistrate of this sense of justice so as to advance the ends of law, and thus for a legal system that will afford due scope for such exercise. This is specially noticeable in his attack upon the "jurisprudence of conceptions" of the historical school.¹³

In the last half of the nineteenth century, the Romanist legal science of the historical jurists in Germany was coming to be out of touch with practical life. It was academic for the reason that much of our common-law legal science, *e. g.* assumption of risk, liberty of contract, right to follow a lawful calling, etc., is academic, — because derived by deduction from historical premises which had lost their value and hence much of their meaning for the society of today. To this academic legal science Jhering sought to oppose "a jurisprudence of realities" in which legal precepts should be worked out and should be tested by their results, by their practical application, and not solely by logical deduction from principles discovered by historical study of Roman and Germanic law. The details of the movement which he started belong to the history of law on the Continent of Europe. But the method by which he brought about a complete change of front marks an era in the modern science of law. Sternberg says:

"With the fundamental proposition that legal conceptions exist for men and not men, whose weal and woe is so largely conditioned by administration of law, for the conceptions, he placed jurisprudence upon the basis of a sound realism of which every separate science, and especially every practical science, has need. The science of law must never lose contact with the present. Its problem is to discover what justice and right require now. It must bring into systematic, scientific order, whereby alone law can fulfil its purpose in the present state of human development, the legal materials brought forth by the living consciousness of right. . . . If the scheme of legal conceptions does not express what the consciousness of right brings to the surface in practice, then the

¹¹ Eck, l. c., 11. Perhaps this is what Kohler refers to when he speaks of Jhering as "*ein ganz unphilosophischer Kopf*." Lehrbuch der Rechtsphilosophie, 16.

¹² "The ethical self-assertion of the individual." Der Zweck im Recht, 4 ed., I, 47-61.

¹³ As to this see Sternberg, Allgemeine Rechtslehre, I, 187-194; Brütt, Die Kunst der Rechtsanwendung, 87 *et seq.*

scheme of legal conceptions must be altered, for it is false or out of date. We are not to seek to force the living ideas of right into fetters for the sake of the system. Such a process simply leads back to a law of nature. . . ."¹⁴

Another consequence of Jhering's teleological method which has been of capital importance for jurisprudence is insistence upon the interests which the legal system secures rather than upon the rights by which it secures them. Law begins by granting actions. In time we generalize from these actions and perceive rights behind them. But, as the actions are means for vindicating rights, so the rights are means conferred by law for securing interests which it recognizes. The scheme of natural rights becomes a scheme of interests which the law ought to protect and secure so far as they may be protected and secured judicially, and hence something for the law-maker to take account of as of moral and political significance, rather than something for the judge to consider as of legal significance. Prior to Jhering the theory of law had been individualist. The purpose of law was held to be a harmonizing of individual wills in such a way as to leave to each the greatest possible scope for free action. Such was the view both of philosophical and of historical jurists.¹⁵ Jhering's, on the other hand, is a social theory of law. The eighteenth century conceived of law as something which the individual invoked against society, an idea which is behind our American bills of rights. Jhering taught that it was something created by society through which the individual found a means of securing his interests, so far as society recognized them. Although much ingenious philosophical criticism has been directed against this theory,¹⁶ it has not affected the central point. The conception of law as a securing of interests or a protecting of relations has all but universally superseded the individualist theory.¹⁷

¹⁴ *Allgemeine Rechtslehre*, I, 190-191.

¹⁵ See, for example, the definitions of Kant, Savigny, and Puchta. "The sum of the circumstances according to which the will of one may be reconciled with the will of another according to a common rule of freedom." Kant, *Metaphysische Anfangsgründe der Rechtslehre*, 27. "The rules whereby the invisible boundaries are determined within which the existence and activity of each individual gains secure and free opportunity." Savigny, *System des heutigen römischen Rechts*, I, § 52. "The recognition of the just freedom which manifests itself in persons, in their exertions of will and in their influence upon objects." Puchta, *Cursus der Institutionen*, I, § 6.

¹⁶ See, for example, Korkunov, *General Theory of Law* (Hastings' transl.), 112-115.

¹⁷ Kohler, *Einführung in die Rechtswissenschaft*, §§ 4, 6; Gareis, *Science of Law* (Kocourek's transl.) 30-35.

Still another consequence is to be seen in the theory of punishment as something to be adjusted not to the nature of the crime but to the nature of the criminal. This *Zweckstrafe*, as the Germans call it, must not be translated "utilitarian punishment." As Saleilles has said, such a statement of the theory ignores the movement inspired by Jhering and the importance he attributes to the idea of end as the "soul of every organic function" and so of the law also.¹⁸ The contrast of *Zweckstrafe* to *Vergeltungstrafe* (the compensatory and retributive punishment of the classical school and of our penal codes) does not mean a utilitarian criminology. It means instead criminal law made a means to social ends; that punishment must be governed by its social end and must be fixed with reference to the future rather than to the past.¹⁹ To quote Saleilles, it is a theory of "punishment characterized by its purpose as opposed to . . . punishment crystallized as a mechanical and mathematical retribution, without effect as to the past and without result as to the future."²⁰ The Italian anthropological and sociological criminalists contributed also to the complete change in theories of punishment which recent years have witnessed. But the social utilitarians connected it with and made it part of a general change of attitude throughout legal science.

Finally, a consequence of Jhering's juristic method is to be seen in the return to the imperative idea of law which has been so marked in recent literature. To one who thinks of society as recognizing interests and creating rights to secure them, law is very likely to be something made rather than found. We should expect him, therefore, to construct an analytical if not an imperative theory. Accordingly, though the rise of legislation in Germany under the Empire has no doubt contributed, the influence of Jhering's teleological method is to be seen in the prevalence in recent German thought of many of the characteristic and much-controverted doctrines of the English analytical school. Many ideas of which we think as distinctly Austinian have come to be commonplaces in the

¹⁸ L'Individualisation de la peine, 2 ed., 11. Since the foregoing was written, an English translation has appeared in the Modern Criminology Series. The passage referred to may be found on p. 9.

¹⁹ See Liszt, Der Zweckgedanke im Strafrecht, im Strafrechtliche Aufsätze und Vorträge, I, 126; Berolzheimer, System der Rechts und Wirtschaftsphilosophie, V, § 23; Saleilles, L'Individualisation de la peine, 2 ed., § 3.

²⁰ L'Individualisation de la peine, 2 ed., 11.

newer literature. Thus, it is held necessary to discuss whether public law is really law,²¹ to argue whether and how far international law is law,²² to point out that customary law obtains its authority from the state,²³ some even laying down Austin's doctrine of tacit command,²⁴ and to insist that whatever agencies may formulate legal rules, they obtain their legal character from the state.²⁵ This analytical bent is especially marked in the social utilitarians and in the works on general theory of law (*Allgemeine Rechtslehre*) in which the influence of Jhering has been stronger than in those upon the philosophy of law. In Austin's case there is an obvious connection between his theories and the legislative reform movement which was in progress before his eyes as he wrote. Similarly in Jhering's case the relation of his theories to the reform movement that led to the downfall of the Romanists of the historical school is sufficiently clear. Those who feel strongly the need of thorough-going reform are likely always to take an imperative position, since their hope lies in legislation. Usually it is only by procuring an authoritative expression of the will of the community that they may expect to establish their ideas in the legal system of the present.

Jhering was more a jurist than a philosopher. Moreover he wrote in the last half of the nineteenth century when philosophy was at its lowest ebb. Hence the philosophical side of his doctrine is coming to be the subject of much criticism. In part this criticism is directed equally to pragmatism as a philosophy of law, and will be considered in another place. But it must be conceded that Jhering ignores an important element in the development of law upon which those who stand for the idealistic interpretation insist rightly, even if too strongly. Legal history shows clearly enough that ideals of justice and of morals have been controlling

²¹ Gumpłowicz, *Allgemeines Staatsrecht*, 3 ed., 375-6 (1907).

²² Liszt in Birkmeyer, *Encyklopädie der Rechtswissenschaft*, 1264 (1901); Heilborn in Holtzendorff, *Encyklopädie der Rechtswissenschaft*, 6 ed., II, 978 (1904); Kohler, *Einführung in die Rechtswissenschaft*, § 102 (1902); Grueber, *Einführung in die Rechtswissenschaft*, § 8 (1901).

²³ Bruns in Holtzendorff, *Encyklopädie der Rechtswissenschaft*, 6 ed., I, 303 (1904); Gareis, *Science of Law* (Kocourek's transl.), 79 (1905).

²⁴ Windscheid, *Lehrbuch des Pandektenrechts*, 9 ed., by Kipp, I, § 15, note 1; Czylharz, *Institutionen*, § 4.

²⁵ Gareis, *Science of Law* (Kocourek's transl.), 75 (1905); Jellinek, *Das Recht des modernen Staates*, 373 (1905).

factors in all periods of growth. In truth his theory, like that of the English analytical jurists, is a theory of law-making rather than of law. As Berolzheimer says:

"If all law has in view the welfare of society, then law abdicates in favor of administration; the idea of political expediency displaces the idea of right. Under the domination of the theory of purpose we have indeed rules of law (*Gesetze*) but no law."²⁶

The social utilitarian may answer that the modern tendency is strongly toward administration for the very reason that it promotes the social ends which at present are matters of urgent concern. But such a tendency is not without precedent. It was very marked in English law in the sixteenth and seventeenth centuries, for much the same reason. The balance between law and administration inclines now one way, now the other, as does the balance between hard and fast rule and wide discretion in the administration of justice. But an attempt to identify the judicial with the administrative by an administrative theory of law will prove quite as futile as has been our common-law attempt to identify them by a purely judicial theory of administration.

On the other hand, Jhering's work is of enduring value for sociological jurisprudence. The older juristic theory of law as an end to individual liberty and of laws as limitations upon individual wills, divorced the jurist from the actual life of today. The jurists of whom Jhering made fun, translated to a heaven of juristic conceptions and seated before a machine which brought out of each conception its nine hundred and ninety-nine thousand nine hundred and ninety-nine²⁷ logical results, have their counterpart in American judges who insist upon a legal theory of equality of rights and liberty of contract in the face of notorious social and economic facts.²⁸ On the other hand, the conception of law as a means toward social ends, the doctrine that law exists to secure interests, social, public and private, requires the jurist to keep in touch with

²⁶ *Rechtsphilosophische Studien*, 143.

²⁷ *Scherz und Ernst in der Jurisprudenz*, 247, 257.

²⁸ See particularly *Adair v. United States*, 208 U. S. 161, 175, 28 Sup. Ct. 277, 286 (1908); *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539 (1905); *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 16, 59 N. E. 716, 721 (1901); *State v. Haun*, 61 Kan. 146, 162, 59 Pac. 340, 346 (1899); *State v. Loomis*, 115 Mo. 307, 315, 22 S. W. 350, 351, 352 (1893); *Fraser v. People*, 141 Ill. 171, 31 N. E. 395 (1892); *Mathews v. People*, 202 Ill. 389, 67 N. E. 28 (1903).

life. Wholly abstract considerations do not suffice to justify legal rules under such a theory. The function of legal history comes to be one of illustrating how rules and principles have met concrete situations in the past and of enabling us to judge how we may deal with such situations in the present, rather than one of furnishing self-sufficient premises from which rules are to be obtained by rigid deduction.

6. THE NEO-KANTIANS.²⁹

In the Neo-Kantians we see a return to the philosophical method. In England, the reaction from the eighteenth-century law of nature produced first an analytical school and later, partly as a revolt therefrom, a historical school, while the philosophical school came wholly to an end.³⁰ In Germany, a metaphysical jurisprudence supplanted natural law; but it was unfruitful, and the historical school all but displaced philosophical jurisprudence. Hence the recent German jurists represent different phases of a reaction from the historical school. This reaction brought forth first the analytically-inclined social utilitarians and then the philosophically-inclined Neo-Kantians. The sound kernel of the historical doctrine was preserved and developed by the Neo-Hegelians. It is noteworthy that the breakdown of philosophical jurisprudence in both countries coincides with the rise of a body of enacted law in which many traditional rules and doctrines were rejected summarily or made over from end to end. A tendency to dry-rot in juristic theory in periods of enactment and codification is to be observed throughout legal history. As has been seen, the analytical method, unless employed with caution, fosters this condition, because of the imperative conception of law which it involves. In the past also, though with less reason, the historical method has been by no

²⁹ Berolzheimer, *System der Rechts und Wirthschaftsphilosophie*, II, § 48, iii; Brütt, *Die Kunst der Rechtsanwendung*, §§ 6-8; Kantorowicz, *Zur Lehre vom richtigen Recht*.

³⁰ After the introduction to Blackstone's *Commentaries* and Wooddesson's *Elements of Jurisprudence*, there is no attempt at philosophical jurisprudence in England except the second, third, and fourth lectures of Austin, which, as Maine pointed out long ago (*Early History of Institutions*, Lect. XII), have no real connection with his system. The *Principles of Political Obligation* of T. H. Green (lectures delivered 1879-1880, published 1886) and Herbert Spencer's *Justice* (1891) cover but a small part of the field and are to be classed with political rather than juristic philosophy.

means unfavorable to such a condition, since historical jurists have imposed limitations upon themselves, which to greater or less extent have neutralized the liberalizing effects which might else have followed from their doctrines. In Germany, these limitations were twofold: (1) the acceptance of a metaphysical method of deducing a whole system from an assumed fundamental idea, which, when applied in jurisprudence, led to a method of rigorous deduction from principles discovered through historical investigation, and (2) submission to a learned tradition which confined historical study to the texts of the Roman law.³¹ In England, a like limitation was involved in the concession that historical jurisprudence was but complementary to the analytical method.³² In America, distrust of legislation bred by our system of judicial tradition brought about a ready acceptance of Savigny's doctrines, with their incidental limitations, and a learned tradition arose which confined the jurist to the classical common law. Thus it was accepted that all the principles of a legal system sufficient for today were at least implicit in the English case-law of the sixteenth century, if not in the Year Books. The philosophical method has always been the means of escape from such conditions, and a return thereto in the twentieth century was to be expected. It was the task of the Neo-Kantians to remake philosophical jurisprudence and thus to aid in restoring the juristic ideals of reason and justice which, under the influence of analytical and historical methods, the world had seemed fated to lose or to forget.

³¹ On this see Kantorowicz, *Zur Lehre vom richtigen Recht*, 8. He finds five reasons for the self-imposed limitations of the German historical school, namely, (1) "a romantic disposition which found a contemplative immersion in history more attractive than actual taking part in the battles of the day," (2) that it succeeded the hasty and somewhat crude codifications of the sanguine, action-loving era of the French Revolution, (3) that the period in which it arose was one of political inactivity or even reaction, (4) acceptance of a "complaisant metaphysic which asserted it had found 'the reasonable' already worked out," and (5) the learned tradition which confined study to the Pandects.

Saleilles says: "In its application to the social sciences, history ought to become a creative force. The historical school had stopped half way." *L'école historique et droit naturel*, *Revue trimestrielle de droit civil*, 80, 95.

Our historical jurists of the last third of the nineteenth century present a remarkable parallel.

³² See Morley's critique of Maine's *Popular Government*, *Studies in Literature*, 103, 118, 149. Much of this reminds one strikingly of what Germans are now saying of their own historical jurists.

Jurists of the eighteenth-century law-of-nature school went much too far in assuming that legal systems which were the result of a long historical development might be reconstructed *in toto* at pleasure in accord with abstract principles of right.³³ As happens frequently in a reaction, the historical school went too far in the opposite direction and attempted to exclude development and improvement of the law from the field of conscious human effort. History itself, however, presently began to refute them. The last quarter of the nineteenth century saw a new series of legislative projects of the first importance, a new literature upon the principles of legislation grew up, and the old historical materials, by this time thoroughly worked over, came to have but secondary value. Moreover the demand of modern society for fuller powers and wider discretion in the magistrate, to enable him to do justice in the great variety of controversies which grow out of a complex industrial organization, led the framers of the new legislation to leave wide margins for application of law at many points by provisions as to "good faith," "equity," the "dictates of good morals," weighing of the "circumstances of the case in hand," and the like. Thus a practical need of a new method arose, since without some method it was felt that the logical exactness of the old system would be superseded by mere guessing. Historical jurisprudence had nothing to offer for this situation and the metaphysical jurisprudence of the first half of the century was dead. The way was open for a new philosophical jurisprudence, and under the influence of the general philosophical awakening of the last decade of the nineteenth century, the opportunity was seized by Rudolf Stammler.³⁴ Avoiding, as one of his critics has said,³⁵ the Utopian rashness of the old natural law and the uncritical phlegm of historical jurisprudence, he sought a middle path; he sought a method of determining not

³³ But this criticism presupposes a considerable development of the legal system. Such cases as the reception of Roman law in Germany, the Anglo-Indian codes and spread of English law over India, the *verbatim* adoption of French codes in so many countries whose prior law was not in the least French, and the new codes of Japan, show that more may be said for the law-of-nature school upon this point than we have been wont to concede.

³⁴ *Wirtschaft und Recht* (1896), 2 ed. (1905); *Die Gesetzmässigkeit in Rechtsordnung und Volkswirtschaft* (1902); *Lehre von dem richtigen Rechte* (1902); *Wesen des Rechts und der Rechtswissenschaft* (in *Die Kultur der Gegenwart*, 1906). See also Sturm, *Die psychologische Grundlage des Rechts* (1910).

³⁵ Kantorowicz, *Zur Lehre vom richtigen Recht*, 9.

the absolutely and eternally just but the just relatively and for the time being; he sought to give us a "natural law with growing content" and thus to make available for a new period of growth an idea which had been perennially fruitful in legal history.

Stammler's doctrines, so far as we are concerned with them here, are developed in his "*Lehre von dem richtigen Rechte*," a title which we might well translate "Theory of Justice through Law," because of the contrast it suggests with the familiar "justice according to law." In this work he says:

"Natural law was to be a law whose content expressed the nature of man; justice through law calls for a law which expresses the nature of law."³⁶ "All schemes of natural law," he adds, "have undertaken, each in its own way, to furnish a project of an ideal code with an unchangeable, unconditionally valid legal content. Instead, it is my purpose to discover a formal method of general validity by which one may treat the material afforded by principles of law, which must necessarily grow and are conditioned empirically, and may criticize and determine this material so that it shall have the character of being objectively just."³⁷

He distinguishes two modes of treating a legal rule. One takes up the content of the rule as it happens to be framed in the special case and deals with it as though it were an end. The other

"seeks to comprehend each rule in question in its character of a means; therefore it asks as to the practical value of the means when applied and undertakes to criticize the content of legal standards."³⁸

The problem which we have to meet is to

"determine under what conditions the character of being just in its applications is present in a particular legal standard";³⁹

³⁶ *Lehre von dem richtigen Rechte*, 95.

³⁷ *Id.* 116.

³⁸ *Id.* 13. In an able and instructive critique of Kocourek's translation of Gareis' *Juristische Enzyklopädie*, Judge Hastings objects to translation of "Norm" by "standard" (6 Ill. L. Rev. 208). This objection proceeds upon our common-law view of legislation as establishing a *rule*, whereas principles are to be found only in adjudicated cases. But the civilian thinks of legislation as affording principles, from which he may on occasion reason by analogy as we do from decisions. It does not furnish merely rules of action, it provides as well standards of decision. In recent German writing, the latter is insisted upon particularly.

³⁹ *Lehre von dem richtigen Rechte*, 27.

we must discover whither to appeal in order to reach a well-grounded decision as to the presence or absence of this quality of being just.⁴⁰ Accordingly he is led to discuss the relation of justice through law to the theory of morals, to natural law (reason), to mercy, and to the idea of right. At first sight this appears to be well-trodden ground. But his new statement of the problem has given a new value to this time-worn subject. Heretofore we have discussed the relation of law, of the body of abstract rules, to morals and ethics. Now our attention is turned instead to the relation of these matters to the administration of justice by rules. The question for the jurist, he says, becomes twofold; on the one hand, the existence of a rule of right and law, on the other, the mode of carrying it out.⁴¹ This change of front in philosophical jurisprudence is of much more importance than the particular theories which any jurist may develop with respect thereto.⁴²

Another noteworthy contribution of Stammler is to be seen in his theory of the social ideal as the criterion of justice through law. Heretofore we have had individualistic criteria. Jurists sought to deduce a system of just rules from freedom or equality or happiness as fundamental conceptions. A change began, indeed, with those utilitarians who saw in justice that which makes for the welfare of all applied as a standard for the conduct of each. Stammler, however, connecting his doctrine with that of Kant at this point, looks not to the individual free will but to the community of free-willing men. In this community, he holds, we are to bring about a harmony of individual ends so that all possible ends of those who are legally bound will be comprehended.⁴³ The contrast with Kant's theory, on which he builds, is significant. The problem which confronted Kant and those who followed him more immediately was the relation of law to liberty. On the one hand we live in an age of legislation, in which there is and must be external constraint and coercion, in which a philosophy that speaks only of reason and ideal justice is not a philosophy of the law that is. On the other hand we live in

⁴⁰ *Id.* 44.

⁴¹ *Id.* 207.

⁴² Kantorowicz says justly that Stammler's endeavor to find a method of "determining and directing the application of legal rules so that they shall have the quality of being objectively just" (*Lehre von dem richtigen Rechte*, 116) would suffice to mark an epoch in the history of the philosophy of law "even if he had met with no success at all." *Zur Lehre vom richtigen Recht*, 10.

⁴³ *Lehre von dem richtigen Rechte*, 196-200.

a democratic age in which the arbitrary and authoritative must have some solid basis other than mere authority and in which the individual demands the widest possible freedom of action. How were these two ideas, external restraint and individual freedom of action, to be reconciled? This question furnishes the clue to all philosophical discussion of the basis of law in the nineteenth century. Kant met it by formulating what has come to be known as "legal justice" — the notion of an equal chance to all exactly as they are, with no artificial or extrinsic handicaps. He looked on restraint as a means and freedom as an end, so that there should be complete freedom of action except so far as restraint was needed to secure the harmonious coexistence of the individual with his fellows according to a universal rule.⁴⁴ For this completely individualist theory in which the individual will is the central point, Stammler substitutes a social theory of justice in which individual ends are to be regarded, rather than individual wills, except as assertion of the individual will is an individual end. The relation of this to what is commonly called "social justice" will be perceived at once.⁴⁵ Its relation to Kant consists in bearing in mind that our community is one of free-willing men and in insisting that the individual wills of these men are not to be overridden arbitrarily. Accordingly, he lays down four fundamental principles of administration of justice through law which may be paraphrased thus:

1. One will must not be subject to the arbitrary will of another.
2. Every legal demand can exist only in the sense that the person obliged can also exist as a fellow creature.
3. No one is to be excluded from the common interest arbitrarily.
4. Every power of control conferred by law can be justified only in the sense that the individual subject thereto can yet exist as a fellow creature.⁴⁶

Stammler warns us expressly that the foregoing principles are not at all like the supposed rules of natural law. They are not premises from which to deduce a whole code. They are rather

⁴⁴ *Metaphysische Anfangsgründe der Rechtslehre*, 27.

⁴⁵ *Cf.* Ward, *Applied Sociology*, 22-24.

⁴⁶ *Lehre von dem richtigen Rechte*, 208-211. Principles 2 and 4 will suggest at once the social legislation discussed by Professor Gray, *Restraints on Alienation*, 2 ed., viii-xi, and will indicate how such legislation may be directed intelligently to true social ends. See my paper, "The Need of a Sociological Jurisprudence," 19 *Green Bag* 607, 612-615.

guides intended to make possible an effective administration of justice through law. Hence they are not merely principles of politics and legislation; even more they lie at the foundation of the art of applying legal rules, and we must adapt them in such way that the actual material of a legal system will give effect to them. This process he calls "subsumption of questions of law under the social ideal and its fundamental principles,"⁴⁷ and he illustrates it by going over the whole field of the law in order to show that the historical content of our legal systems may be so applied to concrete questions with results both just and objectively valid.⁴⁸ Thus he gives us nothing less than a legal theory of social justice.

The value of Stammler's work for the whole science of jurisprudence is now recognized universally. Brütt says:

"He has a place in the philosophy of law comparable to that of Kant in the theory of knowledge. . . . As all prior metaphysic is overthrown by Kant, so all dogmatic theories of method stand after Stammler's theory of justice through law as tried and discarded. In the future all philosophy of law must orient itself with respect to Stammler as the theory of knowledge has had to orient itself with respect to Kant."⁴⁹

Berolzheimer, a Neo-Hegelian and hence a critic of Stammler, says justly:

"Stammler's investigations are of the greater importance in the philosophy of law because in his *Lehre von dem richtigen Rechte* he was the first to set forth in a modern formulation the fundamental problem of natural law, the problem of discovering just law, the problem of the criteria of the idea of right."

"As results we have philosophical bases for a series of questions of the general theory of law and of economics, for which we owe him thanks. At the same time he makes a good disposition of certain ideas of the older philosophy of law and of law-making (particularly Roman private law and the German Civil Code) in that he identifies as applications of justice through law much that the Romans held an expression of *æquitas* or of *naturalis ratio*, which the German Civil Code speaks of as equity or equitable discretion or performance in good faith, etc. — to put the matter in one phrase, *law, congruent with the idea of right*."⁵⁰

⁴⁷ *Lehre von dem richtigen Rechte*, 277.

⁴⁸ *Id.* Bk. III.

⁴⁹ *Die Kunst der Rechtsanwendung*, 118.

⁵⁰ *System der Rechts und Wirthschaftsphilosophie*, II, 438-439.

For sociological jurisprudence, the importance of Stammler's work is threefold:

(1) Like Jhering, he gives us faith in the "efficacy of effort" as Ward happily puts it,⁵¹ and furnishes a philosophical foundation for the conscious endeavor to promote social justice in which the sociologists rightly demand that the science of law as well as the science of legislation coöperate.

(2) He puts a social philosophy of law in place of the individualist philosophy theretofore dominant and formulates a legal theory of social justice.

(3) He adds a theory of just decision of causes to the theory of making of just rules and thus raises the important problem of the application of legal rules, of which there will be much to say in another connection. Suffice it to say here that this has become a burning question in recent juristic literature.

7. THE NEO-HEGELIANS.⁵²

The downfall of the German historical school did not involve the historical method, although in consequence the method suffered a temporary eclipse. The causes of the reaction from that school for the most part are quite outside of a true historical method. Rightly used, that method is as capable of bringing law into accord with life as any other, for it deals with the law as a body of experience in the administration of justice, and so affords our only sure criteria of what will be effective practically and what not, of what will do justice and what will fall short thereof.⁵³ Nothing can be found to

⁵¹ Applied Sociology, ch. II.

⁵² Berolzheimer, System der Rechts und Wirthschaftsphilosophie, II, § 48, iv; Berolzheimer, Für den Neuhegelianismus, Archiv für Rechts und Wirthschaftsphilosophie, III, 193; Berolzheimer, Zum Methodenstreit in der Rechtsphilosophie der Gegenwart, Archiv für Rechts und Wirthschaftsphilosophie, III, 524; Castillejo, Kohlers Philosophie und Rechtslehre, Archiv für Rechts und Wirthschaftsphilosophie, IV, 56.

⁵³ "It is needful to distinguish nicely between the historical school and the historical method. The school of Savigny, taken in its first form, rested upon certain postulates which, under pretext of evolution, could only end in immobilization. The historical method is the method *par excellence*. Disengaged from every subjective element, it holds to facts and to realities, it classifies them and deduces from them the general laws which they permit. Applied to the law, it has no other purpose than to put law in conformity with life." Saleilles, Le Code Civil et la methode historique, Livre du centenaire du Code Civil, I, 97, 99. "That the principles of the historical school

take the place of a thorough understanding of the history of rules and doctrines, whether as a foundation for legislation with respect to them or as a means of interpreting and applying them when made over to fit the legislative mold. Nor can there be an assured method of applying to concrete cases rules expressed in any form unless the method takes account of the relation of the rules to the judicial and juristic experience of the past and seeks to adjust them to the present in the light thereof. If modern jurisprudence were to lose the historical method it would prove even more sterile than the much-abused historical jurisprudence of the last century. Moreover the comparative-historical method, which is a direct outgrowth through attempts to broaden the foundation of the historical school, is indispensable in any thorough-going critique of philosophical, as distinguished from metaphysical, theories. Hence the Neo-Hegelians have performed a service of the first magnitude in preserving and developing the historical method. They have sought to find the proper place for that method in systematic study of law and to relate it properly to the philosophy of law, to anthropology and ethnology and to economics. Thus they may claim, not without reason, to be the heirs of what is best in the philosophical and historical schools of nineteenth-century Germany.

The leader of this school, Josef Kohler,⁵⁴ without question the first of living jurists, is remarkable for the breadth as well as for the depth of his legal scholarship. A pioneer in comparative legal history,⁵⁵ he has made himself an authority not merely upon the general subject but upon more than one special branch⁵⁶ and upon the legal history of more than one primitive people.⁵⁷ At the same time he has made himself an authority upon such specialized subjects of dogmatic law as the law of bankruptcy and patent law,⁵⁸ has

can be totally refuted, is beyond my comprehension. If laws are to be explained, their development must be studied." Leonhard, *The Historical School of Law*, 7 Col. L. Rev. 573, 577.

⁵⁴ Of his numerous works, those which bear immediately upon the matter in hand are: *Einführung in die Rechtswissenschaft* (1902), 2 ed. (1905); *Rechtsphilosophie und Universalrechtsgeschichte*, in Holtzendorff, *Encyklopädie der Rechtswissenschaft*, 6 ed., Vol. I (1904); *Moderne Rechtsprobleme* (1907); *Lehrbuch der Rechtsphilosophie* (1909).

⁵⁵ *Shakespeare vor dem Forum der Jurisprudenz* (1883).

⁵⁶ *Zur Urgeschichte der Ehe* (1897); *Recht, Glaube und Sitte* (1892).

⁵⁷ *Rechtsvergleichende Studien über islamitische Recht, das Recht der Berbern, das chinesische Recht und das Recht auf Ceylon* (1889).

⁵⁸ *Lehrbuch des Konkursrechts* (1891); *Leitfaden des deutschen Konkursrechts*

made important contributions to modern criminalistic,⁵⁹ has written a text-book of the German civil code,⁶⁰ and has taken the lead in the most active and most widely accepted movement in the modern philosophy of law. No one else has come so near to taking all legal knowledge for his province. No one, therefore, is so well prepared to reduce all legal knowledge to a system.

Three points in Kohler's doctrine are of importance for our purpose: his theory of law as a product of the culture of a people, his theory of the relation of comparative legal history and the philosophy of law, and his method of interpretation and application of legal rules.

Declaring that Stammler's Neo-Kantian philosophy of law is unhistorical,⁶¹ Kohler takes for his starting-point a *dictum* of Hegel that law is a phenomenon of culture. But he does not use this proposition as something from which to bring forth an entire system by purely deductive processes. He seeks instead to proceed empirically upon the basis afforded by ethnology, comparative law, and comparative legal history. Savigny held that law was a product of the genius of a people and was no more a result of conscious human will than is language. Kohler, on the other hand, holds that it is a product of the culture of a people in the past and of the attempt to adjust it to the culture of the present. He does not exclude conscious effort to make this adjustment.⁶² On the contrary, he holds that the "jural postulates" of the culture of a people for the time being are to be discovered and that law is to be brought into accord therewith.⁶³ Yet he recognizes, as the legal historian must, the limitations upon "the efficacy of effort" in that we have to shape the material that has come down to us so that it meet the requirements of present culture, "so that it further culture and

(1893), 2 ed. (1903); *Handbuch des Deutschen Patentrechts* (1900); *Forschungen aus dem Patentrecht* (1888).

⁵⁹ *Studien aus dem Strafrecht* (1890-1897).

⁶⁰ *Lehrbuch des bürgerlichen Rechts* (1906).

⁶¹ *Lehrbuch der Rechtsphilosophie*, 16.

⁶² "The principle of relativity of law held by the historical school, which we also insist upon over and over again in comparative jurisprudence, has been thoroughly misunderstood. Since law is relative and is influenced by interests of culture, it has been supposed that law was wholly destitute of fundamental ideas. All distinction between the law that ought to be and the law that is was given up and the fantastic result was reached that the law which exists is the one that ought to be and that one law is as just as another." *Moderne Rechtsprobleme*, § 1.

⁶³ *Lehrbuch der Rechtsphilosophie*, 2.

does not check and repress it.”⁶⁴ Moreover, this adjustment has to be made with respect to a constantly progressing culture. Hence law cannot stand still.

“This law cannot remain the same. It must accommodate itself to the progressing culture of the time and must be so fashioned as to express the growing demands of culture.”⁶⁵

What does Kohler mean by *Kultur*? His own definition is this:

“Culture is the development of the powers residing in man to a form expressing the destiny of man.”⁶⁶

Perhaps Professor Small has done most to make the idea plain to the reader of English. He says:

“What, then, is ‘culture’ (*Kultur*) in the German sense? To be sure the Germans themselves are not wholly consistent in their use of the term, but it has a technical sense which it is necessary to define. In the first place ‘culture’ is a condition or achievement possessed by *society*. It is not individual. Our phrase ‘a cultured person’ does not employ the term in the German sense. . . . At all events, whatever names we adopt, there is such a social possession, different from the individual state, which consists of adaptation in thought and action to the conditions of life. Again, the Germans distinguish between ‘culture’ and ‘civilization.’ Thus ‘civilization is the ennobling, the increased control of the elementary *human* impulses by society. Culture, on the other hand, is the control of *nature* by science and art.’ That is, civilization is one side of what we call politics; culture is our whole body of technical equipment, in the way of knowledge, process and skill for subduing and employing natural resources, and it does not necessarily imply a high degree of socialization.”⁶⁷

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Moderne Rechtsprobleme*, § 1.

⁶⁷ *General Sociology*, 58-60. See also pp. 344-346. Berolzheimer, explaining the term as used in the Neo-Hegelian philosophy of law, says: “Lexis defines the conception of culture thus (*Das Wesen der Kultur*, I, 1, 1906): ‘culture is the raising of men above natural surroundings through the development and manifestation of their spiritual and moral powers.’ Of course what Lexis refers to is not culture as a condition but culture as a source of development. Culture as a condition or result signifies that stage of human development in which groups of men are united in law and state, in a cult or metaphysic (as something always transmitted) and finally through exchange of ideas and art.” *Archiv für Rechts und Wirtschaftsphilosophie*, III, 195-196.

Thus Kohler's doctrine calls for an understanding of the social history of a people and of its relation to law, whereas in the past we have looked to political history and the relation thereof to legal systems. Moreover, he conceives that legal history affords generalizations which are fundamental for the philosophy of law. By comparative study, we are able to construct a universal legal history which has for its task to show

"how the law has developed in the course of history, and in connection with the history of culture, to show what results in the culture of a people have been bound up in law, how the culture of a people has been conditioned by law and how law has furthered the progress of culture." ⁶⁸

In this way history is to be used to enforce the lesson that law must grow and to point the goal and indicate the means of growth, instead of being used to show the futility of conscious change as in the nineteenth century.

But Kohler's most important contribution is his theory of sociological interpretation and application of law. This deserves to be set forth in his own words:

"Thus far we have overlooked most unfortunately the sociological significance of law-making. While we had come to the conviction that it was not the individual who made history but the totality of peoples, in law-making we recognized as the efficient agency only the person of the law-maker. We overlooked completely that the law-maker is the man of his time, thoroughly saturated with the thoughts of his time, thoroughly filled with the culture that surrounds him, that he works with the views and conceptions which are drawn from his sphere of culture, that he speaks with words that have a century of history behind them and whose meanings were fixed by the sociological process of a thousand years of linguistic development, and not through the personality of the individual. The opinion that the will of the law-maker is controlling in construing legislation is only an instance of the unhistorical treatment of the facts of the world's history and should disappear entirely from jurisprudence. Hence the principle: rules of law are not to be interpreted according to the thought and will of the law-maker, but they are to be interpreted sociologically, they are to be interpreted as products of the whole people, whose organ the law-maker has become." ⁶⁹

⁶⁸ *Rechtsphilosophie und Universalrechtsgeschichte*, § 8.

⁶⁹ *Lehrbuch des bürgerlichen Rechts*, I, § 38.

8. THE REVIVAL OF NATURAL LAW IN FRANCE.⁷⁰

In France also the influence of Savigny established the tenets of the historical school, and the philosophical method, while not abandoned entirely, as is demonstrated by a continuous succession of treatises extending through the whole course of the nineteenth century,⁷¹ for a season commanded little attention.⁷² But the dominance of the historical school was much less complete than in Germany. France had a code, and that code remained the model for new codes in every part of the world until the new German code went into effect in 1900. Hence historical jurisprudence in France had merely the easy task of overthrowing the eighteenth-century law of nature. No other object of attack was at hand. It helped push "juridical idealism" into the background for a time. But the active force was rather the positivists and the older type of sociologists, who became the leaders of French juristic thought in the latter part of the nineteenth century. Presently the movement to bring the law into accord with life which began with Jhering, the vigorous development of the social sciences in France, and a resulting agitation for greater flexibility in the application of legal rules,⁷³ here as elsewhere brought about a new development of philosophical jurisprudence. In France, however, for the reasons suggested above, the movement represents a reaction not only from the historical school but from the positivists and the older type of sociologists as well.

Charmont puts the beginning of the movement as far back as 1891, the date of Beudant's *Droit individuel et l'état*.⁷⁴ But it is hard to see a forerunner in that vigorous and well written assertion of the individualist view as to the state. Written in a period which called for political idealism, its main purpose was to vindicate the

⁷⁰ Charmont, *La renaissance du droit naturel* (1910); Demogue, *Les notions fondamentales du droit privé*, 21 *et seq.* (1911).

⁷¹ See some account of these and of the decadence of philosophy of law in nineteenth-century France in the preface to Boistel, *Cours de philosophie du droit*, I, iii-xiv.

⁷² See the apologetic prefaces to Courcelle Seneuil, *Préparation à l'étude du droit* (1887); Beaussire, *Les principes du droit* (1888); Vareilles-Sommières, *Les principes fondamentaux du droit* (1889).

⁷³ The leader of this movement, which has had a very important bearing upon recent juristic thought on the Continent, was Gény, *Méthode d'interprétation* (1899).

⁷⁴ *La renaissance du droit naturel*, 128.

individual as against the state, which it sought to do by going back to the declaration of the rights of man, reasserting the political theory of natural law, and founding law upon reason. This return to natural law in its eighteenth-century form was quite another thing than the revival of the idealistic interpretation which is the enduring possession of philosophical jurisprudence. The decisive impetus seems to have come from Stammler, whose *Wirtschaft und Recht* was made the subject of comment by Saleilles in 1902.⁷⁵ Stammler's striking phrase "natural law with changing content" served in name to bridge the gap between the old natural law and the new. But in truth beyond the name they have in common only the critical attitude and the insistence upon ideals which must characterize all philosophical jurisprudence.

It is interesting to note that the paper which may be regarded as marking the turning point in France did not come from an exponent of the philosophy of law. At the very end of the nineteenth century Boistel proceeded by deducing a whole system from an individualist principle of respect for personality and thus gave us simply a modernized metaphysical jurisprudence.⁷⁶ Stammler's ideas were taken up instead by an avowed adherent of the historical method⁷⁷ who at the same time was a leader in the field of comparative law.⁷⁸ Thus the factors in the revival in France appear to be three: the influence of Stammler's doctrine, the survival of philosophical jurisprudence both of the eighteenth-century and of the metaphysical type, and, not least, the verification of the idealistic interpretation by comparative law.

Two extracts will show the spirit of the new juristic thought in France. In the paper referred to Saleilles says:

"What does not change is the fact that there is a justice to be realized here below, the sentiment that we owe to all respect for their right, according to the measure of social justice and social order. But what shall be this measure, what shall be this justice, what shall be this social order? No one can say *a priori*. All these questions depend upon certain social facts with which the law comes in contact. These facts change,

⁷⁵ L'école historique et droit naturel d'après quelques ouvrages récents, *Revue trimestrielle de droit civil*, I, 80 (1902).

⁷⁶ Cours de philosophie du droit (1899).

⁷⁷ See *ante*, note 53.

⁷⁸ See a brief notice of Professor Saleilles and of his writings upon comparative law in my introduction to the English version of his *Individualisation of Punishment*.

evolve, and are transformed. But that depends also upon the conceptions one frames as to justice, as to authority and liberty, as to the right of the community and the rights of individuals, as to the proportion to be established in the incessant strife between these opposing forces; and this proportion varies and alternates."⁷⁹

Charmont says:

"The idea of natural law, then, is conceived differently than it was formerly. It rests upon a different basis. At the same time it undergoes certain transformations. It is reconciled with the idea of evolution and with the idea of utility. It loses its absolute and immovable character. It has only a variable content. It takes account of the interdependence of the individual and of the whole. It tends also to reconcile the individual conscience and the law instead of putting them in opposition. In so transforming, juridical idealism is not weakened. On the contrary it is strengthened and broadened."⁸⁰

Perhaps Demogue states it as well as it can be stated in saying that the new juridical idealism seeks "the ideal of an epoch" instead of endeavoring to realize an absolute ideal.⁸¹ This means that the historical school and the philosophical school have come together in France, as the historical school and the analytical school came together in England. The historical jurists overthrew the old edifice of a law of nature and showed the futility of attempts to deduce a universal model code from abstract principles. But their attempt to find all the principles of law for the present and the future in the past proved futile also. Each has had to concede something. The philosophical jurist has been driven to concede the relativity of juristic ideals; the historical jurist finds himself driven to concede that ideals of right and justice have always been the motive force in periods of development and are needed to preserve life in the law. He is forced to admit that the past does not furnish all the materials for a healthy criticism. Thus we get a school of jurists who preserve and apply the historical method and at the same time preserve and apply the philosophical method; using the one to explain and the other to criticize the materials of existing law. History enables us to understand what we have and to perceive what we may hope to do with it. Philosophy enables

⁷⁹ *L'école historique et droit naturel*, Revue trimestrielle de droit civil, I, 80, 98.

⁸⁰ *La renaissance du droit naturel*, 217-218.

⁸¹ *Les notions fondamentales du droit privé*, 22.

us to understand the measure by which it should be judged and the extent to which our juridical material conforms thereto.

The mechanical ideas of the positivists and of the older sociologists have likewise been given over. In the end they were leading to the same condition of juristic stagnation to which the historical school had led us. As Demogue puts it:

"In spite of the historical school, in spite of the importance of the sociological school which in its turn believed it could limit everything to study of the laws of evolution, we believe in the necessity of an ideal; for there is in human activity a certain element of the conscious, of the willed, which must be directed. To deny this is to put the laws of the physical world in the same rank with the principles of human action and to reduce the law to a descriptive study. It is also to refuse to guide the law-maker."⁸²

It is not an accident that something very like a resurrection of natural law is going on the world over in the wake of the psychological movement in sociology.⁸³

9. THE ECONOMIC INTERPRETATION.⁸⁴

The relation of law to political science and economics is such that it was to be expected that the Marxian economic interpretation of history would be taken up in jurisprudence. This did happen. But it was long in coming and the progress of the idea in jurisprudence has been slight. Yet no account of contemporary juristic thought would be complete without some statement of the doctrine and of its applications to jurisprudence.

Seven ways of interpreting history have been recognized.⁸⁵ The

⁸² *Ibid.* Sociologists today make the same criticism of the older sociological methods. Small, *General Sociology*, 636-639.

⁸³ See the use of Ahrens and Röder by Adler in his paper upon *Persönlichkeitsrechte* in *Festschrift zur Jahrhundertfeier des allgemeinen bürgerlichen Gesetzbuches*, 165, 175 *et seq.*; the "strengthening of the philosophical portion" in recent German texts, e. g. Gareis, *Science of Law* (Kocourek's transl.), xx; and Bigelow's attempt to found a sociological natural law, *Centralization and Law*, Lectures III and IV.

⁸⁴ Berolzheimer, *System der Rechts und Wirthschaftsphilosophie*, II, § 38, i; Stammler, *Wirtschaft und Recht*, 22-80; Menger, *Neue Staatslehre*, 2 ed., 16-27; Gumpłowicz, *Geschichte der Staatstheorien*, 371 *et seq.*; Berolzheimer, *Rechtsphilosophische Studien*, 81 *et seq.*; Croce, *Riduzione della filosofia del diritto alla filosofia dell' economia*.

⁸⁵ In my account of this I have relied upon Seligman, *The Economic Interpretation*

idealistic interpretation,⁸⁶ which reached its highest development with Hegel, sought to interpret all historical growth in terms of thought and feeling. The religious interpretation found the clue to human progress and the determining influence in human development in religion. The political interpretation, a method beginning with Aristotle which has governed our political thought and has been the favorite interpretation in England and in America, found the clue to progress in a gradual but definite movement from absolutism to freedom in political institutions. The physical interpretation,⁸⁷ which begins in Vico and Montesquieu, and was worked out more fully by Buckle and perhaps more sanely by Ratzel, found the controlling factors in physical environment and looked to external physical causes, to climate, food, and soil, to explain social development. The ethnological interpretation is not easy to distinguish from the physical interpretation, but it differs in throwing the main stress upon the character and genius of races and the effects of race influence upon society. On the whole, it is ultimately a biological interpretation.⁸⁸ The culture interpretation finds the mainspring of human progress in the development of human culture, in the endeavor for increased culture.⁸⁹ Finally, the economic interpretation, of which Marx was the original exponent, proceeds upon the theory that "economic institutions are historical categories, and that history itself must be interpreted in the light of economic development."⁹⁰

In like manner and, indeed, growing out of the foregoing modes of approaching history in general, there are at least six ways of interpreting jurisprudence and legal history, and the several schools

of History, 2 ed.; Barth, *Die Philosophie der Geschichte als Soziologie*, 200-346; Small, *General Sociology*, 44-62.

⁸⁶ Barth calls it "ideological." *Die Philosophie der Geschichte als Soziologie*, 267. The individualistic interpretation, which Barth discusses, a view that the actions of great individuals are the only proper content of history, has no importance for jurisprudence.

⁸⁷ I use Professor Seligman's terminology here. Barth speaks of an anthropogeographical interpretation. *Die Philosophie der Geschichte als Soziologie*, 224.

⁸⁸ I take it Professor Seligman would include both this and the following among the applications of the economic interpretation. *Economic Interpretation of History*, 2 ed., 70 *et seq.* Classification is not of great importance here, but the distinctions recognized by Barth tally so well with marked and significant differences in juristic method that I have preferred to follow him at this point.

⁸⁹ As to the meaning of "culture" here, see *ante*, note 67.

⁹⁰ Seligman, *Economic Interpretation of History*, 2 ed., 35.

of jurists may be differentiated easily enough according to the interpretation for which they stand. The idealistic view of jurisprudence traces the development of the idea of justice as an ethical and moral phenomenon and its manifestations in the rules and principles applied in judicial decision, legislation, and doctrinal speculation. It seeks, therefore, the metaphysical or philosophical basis of justice and right as ideas. Upon the one idea, it seeks to construct legal history, upon the other, jurisprudence. This was the standpoint of the metaphysical jurists of the nineteenth century and of the historical jurists who accepted their metaphysic.⁹¹ The religious interpretation of jurisprudence has found the key to juridical progress and to legal institutions in the progress of religious thought and in religious institutions. Something of the sort was attempted by Stahl⁹² on a large scale, and others have tried to write particular chapters of legal history from this standpoint, — usually with very little result.⁹³ The political interpretation is the one with which we are all familiar. It assumes that a movement from subjection to freedom, from status to contract, is the key to legal as well as to social development. Thus it is a phase of the idealistic interpretation, seeing in law and in legal history a manifestation and development of the idea of liberty. Accordingly it finds the

⁹¹ "The complete science of jurisprudence consists, therefore, in the rational comprehension of the whole of the conception of right as developed in time. In other words, the whole of jurisprudence is embraced in the universal history of Right. This universal history gives a representation of the perpetual connection of the formation, growth, and living principle of a people, and shows, in fact, how the realities of Right have been organically developed in the course of time in the progress of the world's history." Friedländer, *Juristische Encyklopädie*, 65 (1847), translated by Hastie, *Outlines of Jurisprudence*, 153.

⁹² "The apprehension of things in their grand total coherence, according to their highest cause and last purpose we call world-view. Every philosophical system is such a world-view. Every religion includes such a world-view, none the less if with less thorough development. This is true also of the Christian religion. Now it is the latter which we take as the foundation of the theory of law and of the State." Stahl, *Philosophie des Rechts*, II, § 5 (1829).

⁹³ *E. g.* Troplong, *De l'influence du christianisme sur le droit civil des Romains* (1843); Maass, *Der Einfluss der Christenthum auf das Recht* (1886).

Yet such cases as the Stoic influence upon the classical period of Roman law and Puritan influence upon the common law must warn us that this interpretation is not to be despised. See my address, "Puritanism and the Common Law," *Proc. Kansas State Bar Assn.*, 1910, 45. To those who accept the idealistic interpretation in whole or in part, religion must be an important factor. Those who follow the culture interpretation lay stress upon religion as one of the elements of culture. Kohler, *Lehrbuch der Rechtsphilosophie*, 27, 152, 172.

end of all law in liberty and conceives of jurisprudence as the science of civil liberty. As Lorimer puts it,

"the proximate object of jurisprudence, the object which it seeks as a separate science, is liberty."⁹⁴

The ethnological interpretation has been expounded by Post, and was in great favor with sociologists during the reign of the so-called biological sociology. It looks to the ethnological environment of laws and finds in the characteristics of the races of man among whom laws exist the determining factors in juridical progress and in legal institutions.⁹⁵ It has close relation to the physical interpretation of Montesquieu, the economic interpretation and the culture interpretation, and used moderately, as Post uses it, is a needful corrective of other interpretations. He has not claimed for it that it was all-sufficient. As used by Post, the procedure in such an interpretation is purely empirical. But there have been those who have turned this into an idealistic method, postulating a certain type of legal genius for each people and then expounding their legal institutions as manifestations thereof.⁹⁶ The culture interpretation of the Neo-Hegelians has been considered in another connection. Only the idealistic and the political interpretations have had followers in America, and the latter has prevailed almost entirely.⁹⁷

⁹⁴ Institutes of Law, 2 ed., 353 (1880). Lorimer was one of the leaders of the meta-physical school of the nineteenth century. But historical jurists took the same view: "Freedom is the foundation of right, which is the essential principle of all law." "It is in freedom that the germ of all right and law lies." Puchta, *Cursus der Institutionen*, I, § 2 (1841), translated by Hastie, *Outlines of Jurisprudence*, 5, 6. Sir Henry Maine's famous generalization, *Ancient Law*, ch. 5 (1861), is an interpretation of legal history in this same way.

Under the influence of this political interpretation, it is a commonplace method to expound the "external history" of a legal system by way of introduction thereto. See, for example, Taylor, *Science of Jurisprudence*, chs. 3 and 4. Correspondingly, those who adopt the older idealistic interpretation preface a history of law with a discussion of the idea of right and justice and its development. See the remarks upon this practice in Pollock & Maitland, *History of English Law*, 1 ed., xiii.

⁹⁵ "Ethnological jurisprudence . . . is the investigation of the ethnical or social causes of the social manifestations of right (law)." *Ethnologische Jurisprudenz*, I, § 2 (1894).

⁹⁶ Carle, *La vita del diritto*, Bk. V (1880). Many attempts have been made to deal with the history of Roman law, particularly its beginnings, in this way. See Voigt, *Römische Rechtsgeschichte*, I, § 2 (1892).

⁹⁷ Two recent attempts at an idealistic interpretation are Kinkead, *Jurisprudence, Law and Ethics* (1905) and Pattee, *The Essential Nature of Law* (1909).

The economic interpretation has been expounded and applied to Anglo-American legal history by Brooks Adams.⁹⁸ His interpretation regards law as a manifestation of the will of the dominant social class, determined by economic motives. He asserts that the idea of justice has had nothing to do with the actual course of doctrinal development and legal evolution.⁹⁹ He maintains that "the rules of the law," to use his own words, "are established by the self-interest of the dominant class so far as it can impose its will upon those who are weaker."¹⁰⁰ The influence of propinquity has evidently given to this doctrine the imperative turn which suggests so strongly the analytical view. Austin might well say something like this, substituting the ideas of utility held by the dominant class for the self-interest of that class. Elsewhere, the imperative feature has been omitted; but with that exception the doctrine has been stated in the same way. Thus Croce says:

"The true history of the law of a people — of the law really enforced and not merely that formulated in the codes, which is often a dead letter — cannot be other than one with the social and political history of that people, which means that all juridical history is economic, a history of wants and of labor."¹⁰¹

So far as any of the foregoing interpretations is insisted upon as the *unum necessarium* in jurisprudence, one must feel with Professor Small that they are simply "snap-judgments about social laws."¹⁰² This is true especially of the extreme economic interpretation in its imperative aspect. One has only to call to mind some of the many cases in which judicial and juristic idealism has produced and enforced ultra-ethical rules of conduct in advance of

⁹⁸ Centralization and Law, Lectures 1 and 2 (1906); The Modern Conception of Animus, 19 Green Bag 12 (1907).

⁹⁹ "You see that, in the abstract, right and justice as something beyond social convenience or, if you please, class advantage, are figments of the imagination. What you have, as a scientific fact, is an automatic conflict of forces reaching, along the paths of least resistance, a result favorable to the dominant energy." Centralization and Law, 35.

¹⁰⁰ *Id.* 45.

¹⁰¹ Riduzione della filosofia del diritto alla filosofia dell' economia, 46 (1907). Compare Leist, *Privatrecht und Kapitalismus im 19 Jahrhundert* (1911), and Bohlen, *The Rule in Rylands v. Fletcher*, 59 Univ. of Pa. L. Rev. 298, 319. In these studies of the relation of economics to particular doctrines we are upon firmer ground.

¹⁰² General Sociology, 61.

the ideas of the dominant or any other class of the lay community,¹⁰³ or in which a pure juristic tradition logically developed by lawyers drawn from the dominant social class has withstood the interest of that class,¹⁰⁴ to perceive how narrow it is as a foundation for jurisprudence or as a philosophy of legal history. However wrongly entertained and believed in, the ideal of an absolute, eternal justice, to which jurists and judges have sought to make the rules enforced in the tribunals approximate so far as possible, has been a controlling force in the classical periods, the periods of growth, of both of the great legal systems of the world. It was the motive power in the period of the *ius naturale* in Roman law and in the period of the school of natural law on the Continent in the seventeenth and eighteenth centuries. It was equally the motive power in the period of the rise of the court of chancery and the development of equity in England and in the period of American common law, the period of making over the traditional principles of English case law to meet our requirements, in the United States. The doctrine, which purports to rest on history, is refuted by history. And, in truth, it is more an interpretation of legislation than of law; and of that least important part of legislation which arbitrarily seeks new paths. For this reason it interprets the least enduring part of legal development. We must not forget that the administration of justice aims consciously at more than the imperative economic interpretation would hear of; and so we must take account of the extent to which the human will is moved by tradition, sentiment, the exigencies of a received system and many like factors, even against self-interest.

¹⁰³ E. g. the English doctrines as to trustees that led to the Judicial Trustees Act. "Sometimes I have wandered into a court of equity which knows not juries. One finds oneself in a rarified atmosphere of morality and respectability in which life is hardly possible. Look at the equitable doctrines of constructive notice and constructive fraud. Look at the impossible standard of duty laid down for trustees. Such a system of law could never have arisen with juries." Chalmers, Trial by Jury in Civil Cases, 7 L. Quart. Rev. 15, 19. In the same place, Judge Chalmers speaks of the "sublimated morality" of courts of equity as contrasted with the "sub-lunary" morality of juries. But surely, in England at least, juries have represented the "dominant social energy," since we are taught that while the barbarians administer, the philistines govern, and the British juror is drawn from the middle class.

¹⁰⁴ Certainly the man of business has been representative of the dominant class of our industrial communities in the immediate past. But his needs and desires have made scant impression upon the traditions of our law as to corporations. See Machen, Do the Incorporation Laws Allow Sufficient Freedom to Commercial Enterprise, Transactions, Maryland State Bar Assn., 1909, 78.

Even more must we do this when the administration of justice is in the hands of a profession with a long tradition of principles, an ideal of justice and a systematic science. In other words, we must regard "the spiritual initiative, which is superior to mechanical causation."¹⁰⁵ The insistence of the Neo-Kantians and of the new school of jurists in France upon the psychological side is parallel with the rise of social psychology among the sociologists. What is valid in the economic interpretation is better expressed by Kohler.

Roscoe Pound.

HARVARD LAW SCHOOL.

[*To be continued.*]

¹⁰⁵ Small, *General Sociology*, 639.

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THE LAW SCHOOL. — The registration in the School on November 15 for the last twelve years is shown in the following table: —

	1900-01	1901-02	1902-03	1903-04	1904-05	1905-06
Res. Grad.	1	1	—	4	1	1
Third year	144	149	167	180	182	192
Second year	202	190	196	201	232	216
First year	241	229	228	293	285	243
Specials	58	59	49	60	58	64
	<u>646</u>	<u>628</u>	<u>640</u>	<u>738</u>	<u>758</u>	<u>716</u>
	1906-07	1907-08	1908-09	1909-10	1910-11	1911-12
Res. Grad.	—	2	—	—	2	3
Third year	190	171	169	187	178	219
Second year	199	198	207	191	238	217
First year	243	280	244	311	296	289
Unclassified	—	—	—	—	82	76
Specials	62	63	64	70	3	4
	<u>694</u>	<u>714</u>	<u>684</u>	<u>759</u>	<u>799</u>	<u>808</u>

The following tables show the sources from which the twelve successive classes have been drawn, both as to previous college training and as to geographical districts: —

Class of	HARVARD GRADUATES.			Total.
	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	
1903	43	4	28	75
1904	47	5	17	69
1905	44	4	20	68
1906	52	7	32	91
1907	44	6	40	90
1908	39	5	27	71
1909	30	6	29	65
1910	46	9	38	93
1911	35	5	18	58
1912	36	10	28	74
1913	42	7	33	82
1914	31	6	16	53

Class of	GRADUATES OF OTHER COLLEGES.			Total.
	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	
1903	23	26	83	132
1904	25	29	74	128
1905	23	27	78	128
1906	30	45	92	167
1907	32	33	89	154
1908	19	33	96	148
1909	30	24	98	152
1910	25	27	101	153
1911	26	29	104	159
1912	38	33	150	221
1913	18	27	151	196
1914	27	37	151	215

Class of	HOLDING NO DEGREE.				Total of Class.
	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.	
1903	21	1	12	34	241
1904	22	—	10	32	229
1905	12	2	18	32	228
1906	25	1	9	35	293
1907	18	5	18	41	285
1908	14	1	9	24	243
1909	11	3	12	26	243
1910	15	1	18	34	280
1911	12	1	14	27	244
1912	7	2	7	16	311
1913	5	—	13	18	296
1914	15	—	6	21	289

As the twenty-one Harvard seniors in the first year class have in each instance completed the work required for the A.B. degree, all members of the class are virtually college graduates. The same is true of practically the entire school. Of the seventy-six unclassified students thirty-four have entered this year, and of these, twenty-six are graduates of a college or university, and eight are graduates of law schools.

One hundred and forty-five colleges and universities have representatives now in the school, as compared with one hundred and thirty-eight last year and one hundred and twenty-four the previous year. In the first-year class eighty-three colleges and universities are represented as follows:

Harvard 74; Yale 33; Princeton 22; Dartmouth 15; Brown 11; Bowdoin 8; University of California, Clark College, Oberlin, Williams 4; Amherst, Bates, University of Chicago, Cornell University, University of Illinois, University of Iowa, University of Minnesota, New York University, University of Pennsylvania, 3; Alabama Polytechnic Institute, University of Arkansas, Beloit, Boston College, Buchtel, Carleton, Colorado College, University of Georgia, Holy Cross, University of Kansas, University of Michigan, University of Texas, Trinity (Conn.), Tufts, Union University, University of Virginia, Wabash, Washington and Jefferson, Wesleyan, 2; Allegheny, Bellevue, Bethel, Central University (Ky.), Columbia University, Cotner University, Delaware, De Pauw, Earlham, Elon, Emory, Fisk University, Greenville, Grinnell, Hamilton, Juniata, University of Kentucky, Kenyon, Knox, Lafayette, Loyola, University of Maine, Massachusetts Institute of Technology, Middlebury, University of Mississippi, University of North Dakota, Northwestern University,

Ohio Wesleyan University, Oxford University, Parsons, Pennsylvania College, University of Rochester, Rutgers, Santa Clara, University of Tennessee, Tulane University, Ursinus, University of Utah, Washburn, Washington and Lee University, West Virginia University, Western Reserve University, University of Wisconsin, Wittenberg, Wofford, 1.

LIABILITY OF FUTURE INTERESTS IN PERSONALTY FOR OWNER'S DEBTS. — Although the ancient common law did not recognize the existence of future estates in personality, the law became more liberal at an early period, and there has resulted an approximate assimilation of the rules governing the limitation of future interests in realty and personality.¹ Remainders, vested² and contingent,³ legal⁴ and equitable,⁵ may without question be carved out of the absolute ownership of chattels. However, the power to deal with these interests when once created, has, in most jurisdictions, been confined to narrower limits. This is manifested most frequently in the restrictions placed on two closely allied incidents of ownership, alienability and liability to the demands of creditors.

In these two particulars, the law as to personality and realty has followed much the same trend. The assignment of a vested remainder in either land or chattels was allowed at common law; the estate passed by deed as a present property right.⁶ But contingent remainders in land could be assigned only in equity or by estoppel,⁷ as they were not regarded as present interests,⁸ and, moreover, such an assignment was repugnant to the law of champerty and maintenance.⁹ Though the doctrines of champerty and maintenance never applied to personal property, the rule was the same.¹⁰ In several jurisdictions, this doctrine has been modified by statute and decision, so that a contingent interest may be assigned at law.¹¹

Although alienability and liability to the claims of creditors are two very similar attributes of property and other rights, they have often been disassociated in dealing with future estates. It is everywhere settled that a vested remainder in land may be sold on execution at law, title passing by sheriff's deed.¹² But a vested remainder in chattels is not subject to sale by common-law execution, as the writ of *fieri facias*

¹ See 2 BL. COMM. 398; 2 KENT COMM. 352. Cf. N. Y. CONSOL. LAWS, 1909, c. 41, § 11; N. Y. LAWS OF 1909, c. 45.

² Hyde v. Parrat, 1 P. Wms. 1; Langworthy v. Chadwick, 13 Conn. 42.

³ Logan v. Executor of Ladson, 1 Desaus. (S. C.) 271.

⁴ Dargan & Bradford v. Richardson, Dud. (Ga.) 62.

⁵ Patterson v. Devlin, McMul. Eq. (S. C.) 459.

⁶ Dargan & Bradford v. Richardson, *supra*.

⁷ Den d. Hopper v. Demarest, 21 N. J. L. 525; Watson v. Smith, 110 N. C. 6, 14 S. E. 640. See 4 KENT COMM. 260.

⁸ See WILLIAMS, REAL PROPERTY, 21 ed., 369.

⁹ See BUTLER AND HARGRAVE, NOTES ON CO. LITT., 265 a, note 212.

¹⁰ Ridgeway v. Underwood, 67 Ill. 419. It does not appear that a contingent remainder in chattels ever passed by estoppel.

¹¹ Lawrence v. Bayard, 7 Paige (N. Y.) 70; Ham v. Van Orden, 84 N. Y. 257. 1 REV. STAT. OF 1836, 725, § 35 was in force when these cases were decided. Putnam v. Story, 132 Mass. 205.

¹² Atkins v. Bean, 14 Mass. 404; Deadman v. Yantis, 230 Ill. 243, 82 N. E. 592; Sheridan v. House, 4 Keyes (N. Y.) 569.

requires an actual custody and delivery of the goods, and it can be reached only by a creditor's bill in chancery.¹³ In both realty and personalty contingent interests are beyond the reach of creditors in most jurisdictions. A contingent remainder in land, not being assignable, may not be sold on execution at law¹⁴ and *a fortiori* the same is true of a contingent remainder in chattels. The right to realize on them by a creditors' bill in equity seems to depend upon whether they may be accorded the dignity of an existent estate. In most jurisdictions this is denied.¹⁵ Assignments of contingent remainders in equity are sustained as specific performance of contracts to assign after the estate vests, and it is said that a court of equity cannot compel a debtor to make such a contract.¹⁶ However, in a few jurisdictions the courts have been willing to raise contingent estates above the rank of mere possibilities,¹⁷ and in others the same result has been produced by statute, so that a contingent interest in lands or chattels may be reached by a creditors' bill.¹⁸ The question was raised for the first time in New York by a recent case which decided¹⁹ that an equitable contingent remainder is "property" within section 1871 of the Code of Civil Procedure. *National Park Bank v. Billings*, 144 N. Y. App. Div. 536, 129 N. Y. Supp. 846. The court appears to have been influenced by section 59 of the Real Property Law,²⁰ which declares that all interests in land or chattels shall be alienable like estates in possession. However, it is possible that the same result might have been reached independently of the statute. It requires no straining of logic to say that a contingent remainder dependent only on surviving the life tenant and attaining a certain age, is more than a mere possibility. Such estates were always transmissible,²¹ and the fact that the interest is equitable rather than legal offers no ground for a valid distinction.²² Under the New York statute defining contingent remainders,²³ estates that in other jurisdictions would be treated as contingent are called vested, and accorded, without question, the dignity and attributes of a present property.²⁴ It is difficult to see why an estate limited with an added contingency sufficient to withdraw it from the terminology of this statute should be so different in its essence, as to be beyond the reach

¹³ *Dargan & Bradford v. Richardson*, *supra*; *Allen v. Scurry*, 1 Yerg. (Tenn.) 36; *Lockwood & Co. v. Nye*, 2 Swan (Tenn.) 515.

¹⁴ *Haward v. Peavey*, 128 Ill. 430, 21 N. E. 503; *Roundtree v. Roundtree*, 26 S. C. 450, 2 S. E. 474.

¹⁵ *Howbert v. Cauthorn*, 100 Va. 649, 42 S. E. 683; *Watson v. Dodd*, 68 N. C. 528.

¹⁶ *Watson v. Dodd*, *supra*.

¹⁷ *Jacob, Jr. v. Howard*, 15 Ky. L. Rep. 133, 22 S. W. 332.

¹⁸ MASS. REV. LAWS, c. 159, § 3, cl. 7, provides for a "suit by creditors to reach and apply in payment of a debt, any property, right, title or interest, legal or equitable, of a debtor, which cannot be reached at law, if the value can be ascertained by sale, appraisal or by any means within the ordinary procedure of the court." *Alexander v. McPeck*, 189 Mass. 34, 75 N. E. 88. The Missouri statute provides for execution sale of any interest in real estate. MO. GEN. STAT. OF 1865, 642, § 18; *White v. McPheeters*, 75 Mo. 286.

¹⁹ Scott and McLaughlin, JJ., dissented with opinions.

²⁰ N. Y. CONSOL. LAWS, 1909, c. 50; N. Y. LAWS OF 1909, c. 52. Cf. *Cohalan v. Parker*, 138 N. Y. App. Div. 849, 123 N. Y. Supp. 343.

²¹ *Pinbury v. Elkins*, 1 P. Wms. 563; *Crawford v. Clark*, 110 Ga. 729, 36 S. E. 404.

²² *Ricketson v. Merrill*, 148 Mass. 76, 19 N. E. 11.

²³ N. Y. REAL PROPERTY LAW [CONSOL. LAWS, 1909, c. 50; LAWS OF 1909, c. 52], § 40.

²⁴ *Bergmann v. Lord*, 194 N. Y. 70, 86 N. E. 828.

of a court of equity. On the other hand, it is conceivable that a court of equity might, in its discretion, deny this relief, as the sacrifice involved in the sale of a contingent interest may be unconscionable.²⁵

VALUATION OF WATER RIGHT AND FRANCHISE AS BASIS FOR DETERMINING IRRIGATION RATES.—The law is now settled by decision,¹ or by statute,² that a company engaged in distributing water for irrigation is in the public service. Not only must it supply all who apply properly,³ but the rates must be reasonable and are subject to public regulation.⁴ The basis generally approved for determining the rates is a fair return on the present value of the property used in the business.⁵ A recent case decides that water rights are rights of the consumer attached to his land and not property upon which the irrigation company is entitled to an income, but that the company's franchise is to be valued as a basis for returns. *San Joaquin & Kings River Canal & Irrigation Co. v. County of Stanislaus*, Circ. Ct., N. D. Cal. The case involves the western doctrine of prior appropriation, under which the first taker of water obtains a vested right in it.⁶ Appropriation by an irrigation company not owning land has led to conflicting theories regarding the basis of the right. The weight of authority is that the user is the appropriator, and the company, though in the public service, is the agent of the landowner.⁷ Such reasoning is unsatisfactory. The requisites for appropriation being diversion, and application to a beneficial use within a reasonable time,⁸ it would seem that the company which diverts the water and applies it to lands other than its own meets the requirements. The company may change the point of diversion, the place of use, and may sell the right apart from the land.⁹ The water right is a property right,¹⁰ but the fiction that it belongs to the consumer need not be resorted to in order to reach the conclusion of the court in the principal case. Whatever theory be taken, the right is not one upon which a return would be justified. Undoubtedly it depends upon the consumer for its continuance;¹¹ so to charge for it is to charge for doing what the consumer allows; it is to require payment for the very right on which

²⁵ In *Jacob, Jr. v. Howard*, *supra*, the decree was, that only a small portion of the estate be sold, as a sacrifice was to be avoided, if possible. The Massachusetts court has allowed equitable execution on a remainder subject to a single contingency, but refused to do so as to an interest subject to a double contingency. *Clarke v. Fay*, 205 Mass. 228, 91 N. E. 328. In *Howbert v. Cauthorn*, *supra*, the court said, "It would be a speculative transaction, and ruinous in its consequences, not only to creditors, but to all parties interested."

¹ *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56.

² See, for example, CAL. STAT., 1885, 95.

³ *San Diego Land & Town Co. v. Sharp*, 97 Fed. 394.

⁴ *Salt River Valley Canal Co. v. Nelsens*, 10 Ariz. 9, 85 Pac. 117.

⁵ *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 19 Sup. Ct. 804.

⁶ *Atchison v. Peterson*, 20 Wall. (U. S.) 507.

⁷ *Gould v. Maricopa Canal Co.*, 8 Ariz. 429, 76 Pac. 598.

⁸ See *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 28 Pac. 966, 967.

⁹ *Strickler v. City of Colorado Springs*, 16 Colo. 61, 26 Pac. 313.

¹⁰ See *Cash v. Thornton*, 3 Colo. App. 475, 34 Pac. 268, 269.

¹¹ *New Merger Ditch Co. v. Armstrong*, 21 Colo. 357, 40 Pac. 989.

the ability to do business is predicated. To allow a street railway to charge for its right to use its tracks would be as permissible. Attempts by irrigation companies to collect for water rights in addition to the fee for distributing have been held invalid.¹² If such charges could not be made, certainly a valuation of such water right could not be added to the value of the property to increase the rates. Of course where the company has paid for the acquisition of water rights, a different result should follow.

On principle, the value of a franchise should not be a basis for determining rates. A franchise has value only in proportion to its capacity to earn profits; it increases in value with the earnings. If a high rate would be justified on account of the great value of the franchise, this fact would in turn enhance the value of the franchise itself and justify a still higher charge.¹³ The principal case is the first square decision on this point, but seems opposed to previous judicial intimations.¹⁴ There is a clear distinction between allowing for the value of a franchise where a plant is sold or taken by eminent domain, and allowing for it as a basis of rates. All courts allow for it in the former case,¹⁵ as well as where the company has paid for the franchise.¹⁶ A franchise has value for such purposes, but a company continuing in business would hardly add its value to the capital stock in estimating the annual income on its property.¹⁷ If the value of the water right cannot be counted because that allows a charge for a value really contributed by the consumer, it seems inconsistent to allow for the franchise, really contributed by the public.

INTERPLEADER IN TAX CASES. — In New York a taxpayer who is about to be forced to pay taxes assessed on the same property in two towns may maintain a bill of interpleader against the towns or their tax collectors.¹ Such a bill is not allowed in Rhode Island² nor in Massachusetts.³ A recent Massachusetts case gives two reasons for denying the relief. *Welch v. City of Boston*, 94 N. E. 271 (Mass.). The first is that the requirements for a bill of interpleader are not satisfied, in that there is no "privity" between the claimants, and that, as the amount of the taxes is different, the plaintiff is not impartial. These objections are merely technical.⁴ The substantial reason given is that the relief would require

¹² *Wheeler v. Northern Colorado Irrigating Co.*, 10 Colo. 582, 17 Pac. 487; *San Diego Land & Town Co. v. National City*, *supra*.

¹³ See *WYMAN, PUBLIC SERVICE CORPORATIONS*, § 1104.

¹⁴ See *Brunswick & Topsham Water District v. Maine Water Co.*, 99 Me. 371, 375-380, 59 Atl. 537, 538-541. The United States Supreme Court has held that a company is entitled to an income on the amount actually paid for a franchise, but not upon the amount which that franchise has since increased in value. *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192.

¹⁵ *Brunswick & Topsham Water District v. Maine Water Co.*, *supra*.

¹⁶ *Willcox v. Consolidated Gas Co.*, *supra*.

¹⁷ *Cf. Cedar Rapids Water Co. v. Cedar Rapids*, 118 Ia. 234, 263, 91 N. W. 1081, 1091.

¹ *Thompson v. Ebbet*, Hopk. Ch. (N. Y.) 272; *Dorn v. Fox*, 61 N. Y. 264.

² *Greene v. Mumford*, 4 R. I. 313.

³ *Macy v. Inhabitants of Nantucket*, 121 Mass. 351.

⁴ See 17 HARV. L. REV. 489; 22 *id.* 294.

delaying the collection of taxes by injunction which is contrary to public policy.

The conflict between this principle of public policy and the desire of courts of equity to give adequate relief to the individual has caused a state of great confusion in the authorities. Three different points of view may be distinguished. 1. Some courts, in direct contradiction to the policy announced in the Massachusetts case, consider that the mere illegality of a tax gives the taxpayer a positive equity to enjoin its collection, even when the law gives an adequate remedy by a suit to recover the money if paid under an illegal tax.⁵ 2. In many jurisdictions the courts, while professing to believe that, as a general rule, it is against public policy to enjoin the collection of taxes, do not allow that policy to interfere with the established jurisdiction of equity; but only allow it to prevent an extension of jurisdiction to all cases of illegal taxes.⁶ If the jurisdiction is invoked to remove a cloud on title,⁷ to prevent multiplicity of actions, or to avoid irreparable injury,⁸ these courts will restrain the collection of illegal taxes. 3. There are many states whose courts take firm ground that public policy demands that equity should endeavor not to clog the wheels of government with injunctions.⁹ The prevention of multiplicity of suits is not a sufficient ground for enjoining the enforcement of a tax in these jurisdictions,¹⁰ and injunctions to remove a cloud on title caused by an illegal tax are given sparingly.¹¹ But the rule against enjoining the collection of taxes is seldom applied with perfect uniformity in the states that acknowledge its force. Such an injunction is sometimes allowed simply because of the hardship of a particular case.¹² Thus it seems that the policy of non-interference with taxes is treated, where it is recognized, not as an overriding doctrine cutting through equity jurisdiction,¹³ but rather as a consideration against granting injunctive relief to be weighed in each case.¹⁴

Should the consideration of policy outweigh the hardship of denying the plaintiff relief in the case of interpleader? Dismissal of a bill of interpleader involves no unbearable hardship on anyone. It is a weaker case on the ground of public policy for equity jurisdiction than a bill of

⁵ *Shenandoah Valley R. Co. v. Supervisors of Clarke County*, 78 Va. 269. See *Allwood v. Cowen*, 111 Ill. 481, 486. A few legislatures also have passed statutes to this effect. GEN. CODE OF OH., 1910, § 12,075; KAN. GEN. STAT., 1909, § 5859.

⁶ *Dows v. Chicago*, 11 Wall. (U. S.) 108; *Indiana Mfg. Co. v. Koehne*, 188 U. S. 681, 23 Sup. Ct. 452.

⁷ See *Wilson v. Lambert*, 168 U. S. 611, 612, 18 Sup. Ct. 217.

⁸ See *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20, 39, 28 Sup. Ct. 7, 14.

⁹ *Messeck v. Supervisors of Columbia County*, 50 Barb. (N. Y.) 190. There are statutes in a few jurisdictions prohibiting judicial interference with the collection of taxes. U. S. REV. STAT., 1875, § 3224; NEB. COMP. STAT., 1901, c. 77, art. 1, § 144.

¹⁰ *Greenwood v. MacDonald*, 183 Mass. 342, 67 N. E. 336; *Dodd v. City of Hartford*, 25 Conn. 232.

¹¹ *New York Life Ins. Co. v. Supervisors of the City of New York*, 1 Abb. Prac. (N. Y.) 250.

¹² *Jackson v. City of New York*, 62 N. Y. App. Div. 46, 70 N. Y. Supp. 877.

¹³ This is the view taken by the younger Pomeroy. 1 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 270.

¹⁴ The fact that a court is giving weight to this consideration of policy is often shown by a tendency to adhere strictly, in tax cases, to the ancient limitations of equity jurisdiction. See *Dodd v. City of Hartford*, *supra*; *New York Life Ins. Co. v. Supervisors of the City of New York*, *supra*.

peace,¹⁵ for a multiplicity of suits is likely to cause inconvenience to the state. It is curious that in New York, where judicial interference with taxes is usually discountenanced,¹⁶ a bill of interpleader should be allowed in tax cases.¹⁷ The Massachusetts court, which is one of the firmest adherents of the principle of not interfering with the collection of taxes, and has denied an injunction in a case involving multiplicity of suits,¹⁸ is amply justified in allowing public policy to override the jurisdiction of equity in the case of interpleader.

CONSTITUTIONALITY OF DISCRIMINATIONS ON THE PARTY-COLUMN FORM OF BALLOT.¹ — A recent case held unconstitutional an amendment of the New York Election Law² providing that "if any person shall have been nominated by more than one political party . . . for the same office, his name shall be printed but once upon the ballot"; and in the party column where his name is not printed shall be printed "see — column";³ and that to vote a "straight ticket" on such party column a mark shall be placed not only at the head of the column but also opposite the place where such candidate's name is actually printed.⁴ *In the Matter of Hopper*, 46 N. Y. L. J. 221 (N. Y. Ct. App., Oct., 1911).⁵

The New York Constitution provides that every male citizen of twenty-one shall vote at all elections;⁶ that no one shall be disfranchised;⁷ and that elections "shall be by ballot or by such other method as may be prescribed by law provided that secrecy in voting be preserved."⁸ But there is no provision that all elections shall be "free and equal."⁹ The New York Court of Appeals, however, based their decision on the ground that such a provision could be implied, and that this law infringed this constitutional right of the electors. The court reasoned that

¹⁵ This view is taken in Rhode Island. Compare the case cited in note 2 with *McTwiggan v. Hunter*, 18 R. I. 776, 30 Atl. 851.

¹⁶ *Merchants National Bank v. Mayor of New York*, 172 N. Y. 35, 64 N. E. 756.

¹⁷ See note 1, *supra*.

¹⁸ See note 10, *supra*.

¹ Three types of the Australian ballot seem to be in use in the United States: the so-called Massachusetts form on which the names of the candidates for an office are placed under the name of the office, followed by a designation of the party or parties by which the candidate is nominated, *cf. Sawin v. Pease*, 6 Wyo. 91, 42 Pac. 750; the "party-column" form, in use in New York; and a hybrid form, like that used in Colorado. COLO. REV. STAT., 1908, §§ 2235, 2236. A ballot similar to the last was declared unconstitutional in California. *Eaton v. Brown*, 96 Cal. 371, 31 Pac. 250.

² N. Y. LAWS OF 1911, c. 649, § 331.

³ This regulation could hardly be defended on the ground that it saved printing or space on the ballot.

⁴ The Supreme Court, Special Term, held the law to be unconstitutional. 45 N. Y. L. J. 2401. The Appellate Division reversed this decision. 46 N. Y. L. J. 1. This was in turn reversed by the Court of Appeals.

⁵ *Cf. Murphy v. Curry*, 137 Cal. 479, 70 Pac. 461. But *cf. State ex rel. Runge v. Anderson*, 100 Wis. 523, 76 N. W. 482; *State ex rel. Bateman v. Bode*, 55 Oh. St. 224, 45 N. E. 195; *Todd v. Board of Election Commissioners*, 104 Mich. 474, 62 N. W. 564, 64 N. W. 496. Since the constitutional provisions as well as the statutes are dissimilar, the cases are not exactly in point.

⁶ N. Y. CONST., Art. II, § 1.

⁷ N. Y. CONST., Art. I, § 1.

⁸ N. Y. CONST., Art. II, § 5.

⁹ Many state constitutions so provide. See PA. CONST., Art. I, § 5; MASS. BILL OF RIGHTS, Part I, § 9; ILL. CONST., Art. II, § 18.

there were precedents for implying restrictions into a constitution;¹⁰ that the New York Constitution of 1777 had spoken of the "equal freedom of the people" as regards voting; and that therefore under all the circumstances the spirit of the present constitution was that elections should be free and equal.

But a state constitution, unlike the federal Constitution, is not a grant of law-making power, but a restriction on the law-making power of the people through their legislature. And much stronger reasons must exist to justify an implication of a restriction on the law-making power, than are necessary to justify an implied grant of such power. In the light, therefore, of the words of the New York Constitution that elections "shall be by ballot or by such other method as may be prescribed by law provided that secrecy in voting be preserved," it is difficult to see how the power of the legislature over the rights of electors may be held to be limited by anything except the express constitutional restriction that no male citizen over twenty-one shall be disfranchised and that secret voting be retained.¹¹

It may be suggested, however, that the law is unconstitutional from another point of view;¹² namely, as an impairment of the right of a person to hold office. The New York Constitution, after stating a form of oath for holders of office, provides that "no other oath, declaration or test shall be required as a qualification for any office of public trust."¹³ A recent New York decision held that to prohibit the nomination by one party of a candidate already nominated by another party was unconstitutional.¹⁴ The law under discussion in effect provides that, while a candidate already nominated by one party may be nominated by another party, if so nominated he must be voted for by a special mark. This requirement obviously raises a possibility that electors voting straight tickets, for parties in which a particular candidate is named only by a blank, may fail, from forgetfulness or other reason, to vote for that candidate; and, in thus unnecessarily lessening his chances for election, it might be held to infringe his right to be subject to no other test of qualification for public office than that provided by the constitution.¹⁵

¹⁰ "Our constitution has never expressly forbidden the taking of private property for private use, but only prescribes that 'private property shall not be taken for public use without compensation.' Yet the courts early held that this necessarily excluded the right to take such property for private use, with or without compensation." *Per Cullen, C. J.*, in the Court of Appeals.

¹¹ See cases cited in note 5. The legislature may restrict representation on the ballot to parties that received a certain percentage of the total vote cast at the last election. *State ex rel. Plimmer v. Poston*, 58 Oh. St. 620, 51 N. E. 150. But the elector has the power to write the name of a candidate on the ballot. *Lamar v. Dillon*, 32 Fla. 545, 14 So. 383. *Contra, State ex rel. Mize v. McElroy*, 44 La. Ann. 796, 11 So. 133. Under the Massachusetts form the printing of a candidate's name more than once may be forbidden. *State ex rel. Sturdevant v. Allen*, 43 Neb. 651, 62 N. W. 35. But a statute that actually disfranchises constitutionally qualified electors under the guise of regulation is void. *Monroe v. Collins*, 17 Oh. St. 665. It can hardly be maintained that the statute in the principal case has this effect.

¹² This view was expressed in the dissenting opinion to the judgment of the Appellate Division that the law is constitutional.

¹³ N. Y. CONST., Art. XIII, § 1.

¹⁴ In the Matter of Callahan, 200 N. Y. 59, 93 N. E. 262.

¹⁵ Cf. *Dapper v. Smith*, 138 Mich. 104, 101 N. W. 60.

HAND BAGGAGE RETAINED IN THE CONTROL OF THE PASSENGER. — The extraordinary liability of a common carrier of goods as an insurer has been said to be a survival of the law as it once was in all cases of bailment.¹ Probably the only cases holding the bailee liable in the absence of negligence rested on his undertaking to carry the goods safe from robbery, and the present insurer's liability is a result of a mistaken extension by Lord Mansfield of those cases.² Whatever the true explanation of the sources of this liability, its basis is a bailment of goods to the carrier as carrier.³ Liability begins only with the delivery of the goods into his possession,⁴ and ends when the possession as carrier ends.⁵ Thus, when the owner accompanies his goods, so that the carrier does not assume the bailee's control, the carrier is not liable as insurer.⁶

For baggage delivered to the carrier for the journey, he is liable as an ordinary carrier of goods.⁷ Lord Holt held in two cases that there was no responsibility, unless a distinct price was paid for the baggage.⁸ But the obligation to transport with the passenger certain personal effects necessary on the journey⁹ has long been recognized¹⁰ and compensation is found in the payment of fare.¹¹ As in the days of the stagecoach the bulkier articles were placed in the boot,¹² so now they are taken in a separate baggage car. But small articles of immediate necessity the passenger has the right to keep with him.¹³

For baggage rightfully retained by the passenger in his sole possession, the rule is well settled that the carrier is responsible only for due care.¹⁴ But the cases are in great conflict where the passenger retains only some degree of control. According to some cases, the carrier has apparently no responsibility at all.¹⁵ Against steamship companies, New York enforces the peculiar innkeeper's liability.¹⁶ Other cases impose the insurer's liability unless the possession by the passenger is exclusive.¹⁷ But unless the possession by the carrier is exclusive, the better view seems to be to hold the carrier responsible only for due care.¹⁸ This test

¹ HOLMES, COMMON LAW, Lecture V.

² *Forward v. Pittard*, 1 T. R. 27. See 11 HARV. L. REV. 158.

³ *The R. E. Lee*, 2 Abb. (U. S.) 49. See *Wyckoff v. Queens County Ferry Co.*, 52 N. Y. 32, 35.

⁴ *Bulkley v. Naumkeag Steam Cotton Co.*, 24 How. (U. S.) 386.

⁵ *Quimit v. Henshaw*, 35 Vt. 605.

⁶ *East India Co. v. Pullen*, 2 Str. 690.

⁷ *Woods v. Devin*, 13 Ill. 746.

⁸ *Middleton v. Fowler*, 1 Salk. 282; *Upshare v. Aidee*, 1 Comyns 24.

⁹ For a good statement of what constitutes proper baggage, see *Woods v. Devin*, *supra*, 750.

¹⁰ *Brooke v. Pickwick*, 4 Bing. 218.

¹¹ See *Chicago & Rock Island R. Co. v. Fahey*, 52 Ill. 81, 83.

¹² See *Brooke v. Pickwick*, *supra*.

¹³ *Runyan v. Central R. Co. of New Jersey*, 61 N. J. L. 537, 41 Atl. 367.

¹⁴ *Tower v. Utica & Schenectady R. Co.*, 7 Hill (N. Y.) 47.

¹⁵ *Steamboat Crystal Palace v. Vanderpool*, 16 B. Mon. (Ky.) 302.

¹⁶ *Adams v. New Jersey Steamboat Co.*, 151 N. Y. 163, 45 N. E. 369.

¹⁷ *Louisville, Nashville & Great Southern R. Co. v. Katzenberger*, 16 Lea (Tenn.) 380; *Richards v. The London, Brighton, & South Coast Ry.*, 7 C. B. 839; *Le Conteur v. London & South Western Ry. Co.*, L. R. 1 Q. B. 54.

¹⁸ *Whicher v. Boston & Albany R. Co.*, 176 Mass. 275, 57 N. E. 601; *American Steamship Co. v. Bryan*, 83 Pa. St. 446.

is in accord with the authorities on the nature of the responsibility of the carrier of goods.¹⁹

A recent case adopts the test suggested, and points out a further requisite for imposing liability as insurer. *Hasbrouck v. New York Central & Hudson River R. Co.*, 202 N. Y. 363, 95 N. E. 808. A trainman of the defendant railway, who was assisting the plaintiff in changing cars, had her handgrip for about fifteen minutes in the front of the car. For a loss of goods from the handgrip, the railway was held responsible only for due care. Although the railway had possession, it was merely temporary, while rendering a service incidental to the carriage of a passenger. Thus, to be liable as insurer, the carrier must hold the goods as carrier.²⁰ Mere possession is not enough.²¹ That the possession is in the regular course of business should not produce a contrary result,²² for of such character is the carrier's possession after completion of the journey, when due care only is required.²³ The principal case should aid in producing a more desirable state of the authorities.

EXTENT OF VALID WAIVER OF CRIMINAL PROCEDURE. — Many incidents of the usual criminal trial procedure may be waived by the defendant without rendering his conviction invalid. Examples of this are his waiver of a formal arraignment,¹ specification of the charges against him,² personal presence at the trial,³ and the right to be confronted by witnesses.⁴ An accused may agree to be bound by the verdict in the case of a co-defendant.⁵ The incidents waived may be assured to him by constitutions,⁶ by statutes,⁷ or by the common law.⁸ But waiver of a jury trial is invalid;⁹ similarly, if the jury have not been sworn a conviction is invalid;¹⁰ and, by the weight of authority, a trial by a jury of less than twelve, though assented to by the accused, is illegal.¹¹ In

¹⁹ Undoubtedly, difficult questions of fact will arise as to what constitutes assumption of possession by the carrier. See *Nashville, Chattanooga & St. Louis Ry. Co. v. Lillie*, 112 Tenn. 331, 78 S. W. 1055.

²⁰ *Holmes v. North German Lloyd Steamship Co.*, 184 N. Y. 280, 77 N. E. 21.

²¹ The carrier may hold the goods as warehouseman. *Laffrey v. Grummond*, 74 Mich. 186. He may have possession momentarily while assisting a passenger to board a street car. *Sperry v. Consolidated Ry. Co.*, 79 Conn. 565, 65 Atl. 962.

²² *Holmes v. North German Lloyd Steamship Co.*, *supra*. *Contra*, *Butcher v. London & South Western Ry. Co.*, 16 C. B. 13. See WYMAN, PUBLIC SERVICE CORPORATIONS, § 760.

²³ *Laffrey v. Grummond*, *supra*.

¹ *Hack v. State*, 141 Wis. 346, 124 N. W. 492. *Contra*, *Crain v. United States*, 162 U. S. 625, 16 Sup. Ct. 952.

² *State v. Mitchell*, 119 N. C. 784, 25 S. E. 783, 1020.

³ *People v. Thorn*, 156 N. Y. 286, 50 N. E. 947.

⁴ *Odell v. State*, 44 Tex. Cr. R. 307, 70 S. W. 964; *State v. Olds*, 106 Ia. 110, 76 N. W.

644.

⁵ *Anonymous*, 3 Salk. 317.

⁶ *Williams v. State*, 61 Wis. 281, 21 N. W. 56.

⁷ *Flynn v. State*, 97 Wis. 44, 72 N. W. 373.

⁸ *Wells v. State*, 16 S. W. 577 (Ark.).

⁹ *Harris v. People*, 128 Ill. 585, 21 N. E. 563.

¹⁰ *Slaughter v. State*, 100 Ga. 323, 28 S. E. 159.

¹¹ *Dickinson v. United States*, 159 Fed. 801. *Contra*, *State v. Sackett*, 39 Minn. 69, 38 N. W. 773.

a recent case, after all the evidence was in, one of the jurors was changed, and all the jurors were then sworn. The only evidence presented to these jurors was the reading of the testimony which had been taken before the original jurors. The accused consented to these proceedings. But it was held that the conviction was illegal. *People v. Toledo*, 72 N. Y. Misc. 635, 130 N. Y. Supp. 440.

The extent of valid waiver must be determined by the purpose of the procedural system and its particular elements. The system itself aims to secure a rational trial. The protection of the accused is the basis of some of its incidents;¹² that of others is said to be a public interest in assuring to him such protection, even against his own will.¹³ In so far as any rule is for the benefit of the accused alone, the validity of his waiver should be unquestioned.¹⁴ But the basic theory of our trial procedure requires that his waiver shall not make the trial irrational. The only other limitations arise from the theory of public interest, and are ascertainable by determining its meaning, its reasonableness, and its present scope.

Definition of the theory of public interest is difficult because the decisions have not attempted it. The meaning cannot be that fairness to the accused requires the usual procedure, unchanged; on the contrary, his waiver may be a convenience, and even a source of protection, to him;¹⁵ and, if anything, the accused is today over-protected.¹⁶ Nor can it mean that procedural changes will be prejudicial to the state as a party; a rational trial is sufficient for the protection of the state in criminal trials. The theory may be merely an example of over-tender regard for the accused; or, possibly, it is a survival of the eighteenth-century notion of an arbitrary magistracy against which the people must be protected.¹⁷ The latter is the more likely, because the theory has been applied only where the principles of constitutional construction require the adoption of views current at the time of the adoption of the American constitutions. Under either explanation, however, it is today logically indefensible.¹⁸ It has never been extended to some of our earliest constitutional provisions.¹⁹ Latterly, the United States Supreme Court has indirectly declared against such a theory.²⁰ It finds its chief expression in the prohibition of the waiver of trial by jury, and such trial features as may be said to be inseparable from the conception of jury trial.²¹ The final question then becomes one of determining what is an integral part of a trial by jury, as provided for constitution-

¹² *State v. Woodling*, 53 Minn. 142, 54 N. W. 1068.

¹³ *Cancemi v. People*, 18 N. Y. 128.

¹⁴ *Schick v. United States*, 195 U. S. 65, 24 Sup. Ct. 826; *State v. Polson*, 29 Ia.

133.

¹⁵ *State v. Kaufman*, 51 Ia. 578, 2 N. W. 275; *Commonwealth v. Dailey*, 12 Cush. (Mass.) 80.

¹⁶ See TAFT, PRESENT DAY PROBLEMS, 343-353.

¹⁷ See *Ex parte Bain*, 121 U. S. 1, 12, 7 Sup. Ct. 781; THE FEDERALIST, No. 83;

3 WASHINGTON, WRITINGS OF THOMAS JEFFERSON, 81-82; MCCLAIN, CONSTITUTIONAL LAW, § 254.

¹⁸ See MCCLAIN, CONSTITUTIONAL LAW, § 254.

¹⁹ *State v. Mitchell*, *supra*; *Dula v. State*, 8 Yerg. (Tenn.) 511.

²⁰ *Hawaii v. Mankichi*, 190 U. S. 197, 23 Sup. Ct. 787; *Dorr v. United States*, 195 U. S. 138, 24 Sup. Ct. 808.

²¹ *Cancemi v. People*, *supra*.

ally. And since the interpretation which makes it impossible to waive a jury is due to an old conception no longer accepted, the theory of public interest should be limited as closely as possible in its application.

DOWER AS SUBJECT TO INHERITANCE TAX. — An important question in the construction of inheritance tax laws is whether dower comes within their scope. A recent Tennessee decision holds that under a statute taxing property passing "under the intestate laws" dower is not taxable. *Crenshaw v. Moore*, 137 S. W. 924 (Tenn.).¹ Illinois under an identical statute adopted the contrary rule.²

In deciding the question as to what is covered by inheritance taxes, the general intention of legislatures in passing such laws must be subordinated to the meaning of the words used to express that intention. The mere fact that the transfer of property occurs on the death of an intestate does not show that it passes under "intestate laws." The term "intestate laws" refers only to the laws "governing intestate succession."³ Clearly all property of an intestate is not subject to the inheritance tax, as for example that which is applied to the payment of the debts of the deceased; for "it is recognized by . . . courts generally that a tax of this character is not a tax on property as such but one upon the right of succession."⁴

Is dower a form of succession? Its origin is probably to be found in an early Germanic custom of the husband's giving the wife a *dos* on marriage.⁵ In Saxon times the widow was supported wholly out of the personal estate, and not until the Norman conquest did dower in land arise. Blackstone says that the reason our law adopted it was "for the sustenance of the wife, and the nurture and education of the younger children."⁶ The right has always been treated with the greatest solicitude until modern times,⁷ and as far back as *Magna Charta*, the widow was freed from the burden of fine and relief, to which all heirs and alienees were subject.⁸ This early special privilege marks a difference between inheritance and dower which is due to the complete lack of connection between dower and the rules of descent; and in fact the widow's estate is a temporary dislocation of these rules. Furthermore before the husband's death the right to dower, although not vested,⁹ is still a continuing right of sufficient importance to be a subject of judicial protection,¹⁰

¹ The same conclusion has been reached under a code. Succession of Marsal, 118 La. 211. And it has been so held with respect to curtesy. *In re Starbuck's Estate*, 63 N. Y. Misc. 156, 116 N. Y. Supp. 1030, aff. 137 N. Y. App. Div. 866, 122 N. Y. Supp. 584.

² *Billings v. People*, 189 Ill. 472, 59 N. E. 798.

³ See *In re Joyslin's Estate*, 76 Vt. 88, 92, 56 Atl. 281.

⁴ See *In re Kennedy's Estate*, 157 Cal. 517, 523, 108 Pac. 280, 282.

⁵ See 1 SCRIBNER, DOWER, 2 ed., ch. 1, § 5.

⁶ See BL. COMM., Bk. II., § 129.

⁷ See 1 SCRIBNER, DOWER, 2 ed., ch. 1, §§ 32, 33.

⁸ See *id.*, § 15.

⁹ *Virgin v. Virgin*, 91 Ill. App. 188; *Boyd v. Harrison*, 36 Ala. 533. But see 2 SCRIBNER, DOWER, 2 ed., ch. 1, §§ 7-18.

¹⁰ *Atwood v. Arnold*, 23 R. I. 609, 51 Atl. 216.

while the expectant heir's right is not recognized.¹¹ But more fundamentally, inheritance or succession¹² are the terms applied to the devolution and distribution of the real and personal property of an estate¹³ which remains after all liabilities have been settled.¹⁴ Dower on the other hand is itself an obligation of the estate created by the law. It is not part of the assets to be distributed; and so important an obligation is it considered that it must be satisfied not only prior to the distribution but even in preference to the other debts of the deceased.¹⁵ This finally must be conclusive proof that the widow is really a creditor and in no sense a distributee,¹⁶ and hence that dower is not a form of succession.¹⁷

The above reasoning can be supported by an analogy. It has been held that "a homestead right . . . is not a right which vests under the law by succession. It is a right bestowed by the beneficence of the law of this state for the benefit of the family"¹⁸ and hence is not subject to an inheritance tax.¹⁹ The same principle is equally applicable to the right of dower.

RECENT CASES.

ACCORD AND SATISFACTION — VALIDITY — RETENTION OF SUM OFFERED AS FULL SETTLEMENT OF ANOTHER'S DEBT. — The father of a debtor wrote to the creditor, offering, in full settlement of the debt, an amount less than that of the debt, and enclosing a draft for that amount. The creditor cashed the draft, and wrote that he had placed the sum on account. *Held*, that he cannot recover the balance from the debtor. *Punamchand v. Temple*, [1911] 2 K. B. 330 (C. A.).

The principal case does not profess to alter the strict English rule as to the question of satisfaction by a third person, but follows a *dictum* of Willes, J., in declaring that payment not technically satisfaction may bar further recovery by the creditor. See *Cook v. Lister*, 13 C. B. N. S. 543, 594. Yet, in order to have that effect, the payment must be received in full discharge of the debt. It was formerly held by the Court of Appeal that whether or not a check or draft, offered in full settlement, was accepted as such is a question of fact to be decided by the trial judge or jury. *Day v. McLea*, 22 Q. B. D. 610. The principal case

¹¹ *Thorne v. Cosand*, 160 Ind. 566, 67 N. E. 257.

¹² The words are practically synonymous according to modern use. See *Stolenburg v. Diercks*, 117 Ia. 25, 29, 90 N. W. 525, 526.

¹³ See *State v. Payne*, 129 Mo. 468, 477, 31 S. W. 797, 798.

¹⁴ *McLaughlin v. Bank of Potomac*, 7 How. (U. S.) 220.

¹⁵ See *Sisk v. Smith*, 6 Ill. 503, 511. In Pennsylvania it is otherwise by statute. See *Porter v. Lazear*, 109 U. S. 84, 86, 3 Sup. Ct. 58, 59.

¹⁶ See *Hill's Admr's. v. Mitchell*, 5 Ark. 608, 618.

¹⁷ "The dissimilarity in the origin, character and duration of the two estates (that of the widow and the heir) must be plain to every apprehension." See *Sutherland v. Sutherland*, 69 Ill. 481, 486. This conclusion is not weakened when, as in the principal case, there is a statute limiting the right of dower to those lands of which the husband died seised. Such a statute, in derogation of the common law, cannot be held to change the nature of dower unless it expressly so provides. It must be confessed, however, that if both this statute and the Pennsylvania statute in note 15 were in effect in the same jurisdiction, from an analytical point of view it would be hard to distinguish such an emasculated dower from a form of inheritance like the *pars legitima* of the Civil Law.

¹⁸ See *Estate of Moore*, 57 Cal. 437, 442.

¹⁹ *In re Kennedy's Estate*, *supra*.

admits that the question is one of fact, but declares that a written protest does not override the evidence of acceptance afforded by the cashing of the draft. It seems doubtful, therefore, whether any evidence would have satisfied the court that the inference of acceptance had been rebutted. If that be so, the principal case shows a strong tendency to overthrow the rule that the question is the one of fact referred to above. For a discussion of the principles involved, see 17 HARV. L. REV. 459, 469-473.

ADMIRALTY—TORTS—DAMAGES RECOVERABLE FROM ONE OF TWO VESSELS AT FAULT. — In a collision at sea a vessel in tow was injured by the fault of the tug and a third vessel. *Held*, that the vessel in tow may recover her whole damage from the third vessel. *The Devonshire*, 27 T. L. R. 490 (P. D.).

This is clearly irreconcilable on principle with the English rule that an innocent cargo can recover only one half of its damage from one of two vessels injuring it. *The Drumlanrig*, [1910] P. 249. If the court allows contribution on the facts of the principal case, the result will be that where a vessel is injured, the English rule as to joint tortfeasors will be the same as the American. See 24 HARV. L. REV. 150. But it seems hardly likely that the English court will allow contribution in a separate suit, since it has refused to allow it where both tortfeasors are in court. *The Avon and Thomas Joliffe*, [1891] P. 7.

ADVERSE POSSESSION — SUBJECT MATTER AND EXTENT — APPLICATION OF CONSTRUCTIVE POSSESSION DOCTRINE TO LARGE TRACTS OF LAND. — The defendant having been for more than 25 years in actual possession of 15 to 20 acres of land under color of title to a 320-acre tract, the plaintiff brought an action of ejectment to recover the entire tract. *Held*, that the defendant has acquired title to the 320 acres. *Marietta Fertilizer Co. v. Blair*, 56 So. 131 (Ala.).

By the American doctrine, the occupation of part of a tract of land under color of title to the whole is constructive adverse possession of the entire tract. *Ellicott v. Pearl*, 10 Pet. (U. S.) 412. The reason for this rule is that it is impracticable for the occupant to clear and cultivate an entire farm at one time. See *Jackson d. Gilliland v. Woodruff*, 1 Cow. (N. Y.) 276, 287. This reasoning is obviously inapplicable to a case where actual possession of a few acres is made the basis for a claim to a vast expanse of country. *Chandler v. Spear*, 22 Vt. 388. Accordingly, several courts have held that the amount of land which can be thus obtained must be limited to a tract which can be used in one body according to the usual manner of business of the country. *Thompson v. Burhans*, 61 N. Y. 52. See *Murphy v. Doyle*, 37 Minn. 113, 116, 33 N. W. 220, 222. The difficulty of applying such a rule is perhaps increased, as the principal case points out, by the large-scale methods of modern business, but its necessity is clear. *Archibald v. New York Central, etc. R. Co.*, 1 N. Y. App. Div. 251, 37 N. Y. Supp. 336. The weight of authority, however, is perhaps in accord with the principal case. *Doe d. Lenoir v. South*, 10 Ired. (N. C.) 237; *Hicks v. Coleman*, 25 Cal. 122. The question is regulated by statute in several states. N. Y. CODE CIV. PROC., § 370; CAL. CODE CIV. PROC., 1906, § 323.

AGENCY — AGENT'S LIABILITY TO THIRD PARTIES — THEORY OF UNDISCLOSED PRINCIPAL APPLIED TO TORTS. — The defendant, concealing the fact that he was merely an agent, employed the plaintiff to work on a building. The plaintiff did not know till after the injury complained of that the defendant was an agent. There was no evidence that the defendant was personally negligent. *Held*, that the defendant is liable as if he were the principal. *Yar-slowitz v. Bienenstock*, 130 N. Y. Supp. 931 (Sup. Ct.).

The agent of a disclosed principal is not liable for injuries to subagents unless he himself has been negligent. *Stone v. Cartwright*, 6 T. R. 411; *Brown*

v. *Lent*, 20 Vt. 529. But when the employing agent conceals his agency, he is liable as if he were principal. *Malone v. Morton*, 84 Mo. 436; *Morris & Co. v. Malone*, 200 Ill. 132, 65 N. E. 704. The principal case apparently suggests that this distinction is explained by the doctrine of undisclosed principal, that an agent who contracts as principal is liable on the contract. *Simon v. Motivos*, 3 Burr. 1921; *Pierce v. Johnson*, 34 Conn. 274. The same rule holds where one contracts as agent but fails to name his principal. *Cobb v. Knapp*, 71 N. Y. 348; *Ye Seng Co. v. Corbill*, 9 Fed. 423. The reason usually given is that the agent is a party to the contract; and in accord with this reason the agent is allowed to sue. *Joseph v. Knox*, 3 Camp. 320; *Short v. Spackman*, 2 B. & Ad. 962. But the principal may also sue on the contract. *Cothay v. Fennell*, 10 B. & C. 671; *Huntington v. Knox*, 7 Cush. (Mass.) 371. As there is a contract with but one person, and on true principles of agency that contract is made with the principal, the reasoning of the cases holding the agent on the contract seems unsound. Certainly it is inapplicable to the principal case, where the liability is not contractual. The decision should be placed on the short ground that the defendant, having induced the plaintiff to enter the employment by holding himself out as principal, is estopped to show that he is not the principal.

AGENCY — SCOPE OF AGENT'S AUTHORITY — BONÂ FIDE PURCHASER FROM PURCHASER WITH NOTICE OF AGENT'S FRAUD. — An agent, in violation of his instructions, delivered a deed which had been executed with the name of the grantee blank. The deed was recorded with the name of a party for grantee, who was chargeable with notice of the agent's wrong. This grantee conveyed to a purchaser for value and without notice. The principal joined all parties in a suit to quiet title. *Held*, that he is entitled to a decree provided he makes good the *bonâ fide* purchaser's loss. *Guthrie v. Field*, 116 Pac. 217 (Kan.).

In Kansas, parol authority to complete a deed executed with the grantee's name blank is sufficient. *Exchange National Bank v. Fleming*, 63 Kan. 139, 65 Pac. 213. This is so even where a third party with the agent's authority writes in the name. *Cf. Commercial Bank v. Norton*, 1 Hill (N. Y.) 501. The agent's incidental power to convey does not depend upon the third party's belief in its existence. *Edmunds v. Bushell*, L. R. 1 Q. B. 97; *Watteau v. Fenwick*, [1893] 1 Q. B. 346. The third party's knowledge of the agent's wrong would make the transaction voidable as to him but would not prevent the passage of title. The *bonâ fide* purchaser's title, therefore, should be unassailable. *Arnett's Committee v. Owens*, 23 Ky. L. Rep. 1409, 65 S. W. 151; *Somes v. Brewer*, 2 Pick. (Mass.) 183. The court relies upon the doctrine that, of two innocent parties, the loss must fall upon the one whose misplaced confidence enabled the wrongdoer to cause it. As applied by the courts in cases like this, it does not differ from estoppel. *Friswold v. Haven*, 25 N. Y. 595; *State v. Matthews*, 44 Kan. 596, 25 Pac. 36. From the nature of a deed it is difficult to find a representation to the purchaser from the grantee, upon which to base an estoppel. *Cf. Grant v. Norway*, 10 C. B. 665. And if there is an estoppel, the innocent purchaser should obtain a perfect title. *Horn v. Cole*, 51 N. H. 287; *Grissler v. Powers*, 81 N. Y. 57. *Contra, Campbell v. Nichols*, 33 N. J. L. 81. In unusual cases, relief upon the terms of the decree in the principal case might be granted. *Cf. New York & New Haven R. Co. v. Schuyler*, 34 N. Y. 30. If the third party completed the deed, without authority from the agent, title would not pass. But the court does not accept this theory of the facts.

BANKRUPTCY — PROPERTY PASSING TO TRUSTEE — CORPORATE NAME. — The trustee in bankruptcy of a corporation sold its good will and trade name. The corporation received its discharge. *Held*, that the purchaser from the

trustee may, and the corporation may not, use the corporate name. *Myers Co. v. Tuttle*, 188 Fed. 532 (Circ. Ct., S. D. N. Y.).

The good will of an individual bankrupt can be sold by the trustee, but not so as to prevent his subsequently doing business in his own name. *Crutwell v. Lye*, 17 Ves. 335; *Bellows v. Bellows*, 24 N. Y. Misc. 482, 53 N. Y. Supp. 853; *Helmbold v. Helmbold Mfg. Co.*, 53 How. Pr. (N. Y.) 453. This rule exists because a man's name is considered so peculiarly his own and so necessary to him that it should be left to him after discharge in order to give him another chance in life. See *Helmbold v. Helmbold Mfg. Co.*, *supra*, 459. Obviously this reasoning does not apply to a corporation, which gets its name from the state, and is given more chance in life than it deserves by being allowed a discharge in bankruptcy at all. There is hence no justification for applying the rule to corporations, and the corporate name should be sold just as all other assets. There seems to be no reason why a corporate name cannot be sold. *Lothrop Pub. Co. v. Lothrop, etc. Co.*, 191 Mass. 353, 77 N. E. 841. Cf. *Lamb Knit Goods Co. v. Lamb, etc. Co.*, 120 Mich. 159, 78 N. W. 1072. See 1 MACHEN, CORPORATIONS, § 468. As far as the wording of the statute is concerned, it could pass to the trustee as "property which . . . he [the bankrupt] could by any means have transferred." BANKRUPTCY ACT OF 1898, § 70 a (5). Or perhaps the term "trade-marks" would include it. BANKRUPTCY ACT OF 1898, § 70 a (2). See PAUL, TRADE-MARKS, § 160. It may be objected that this decision deprives corporations of an incident of the discharge allowed them. It is submitted that it merely refuses them a privilege given for special reasons to an individual.

BILLS AND NOTES — DOCTRINE OF PRICE v. NEAL — OVERDRAFT PAID BY DRAWEE BANK. — The plaintiff bank, under the mistaken belief that the drawer had sufficient funds deposited, paid a check to the payee, the defendant. *Held*, that it cannot recover the amount so paid. *Spokane & Eastern Trust Co. v. Huff*, 115 Pac. 80 (Wash.).

The case represents the great weight of authority. *Hull v. Bank of South Carolina*, Dud. (S. C.) 259; *First National Bank of Denver v. Devenish*, 15 Colo. 229, 25 Pac. 177. The decision is often based on the cases denying relief in the case of forged bills. See *Hull v. Bank of South Carolina*, *supra*, 261. But there the holder, having no claim at all against the supposed drawer, loses if he must refund. In this case, the note being valid, a claim does exist against the drawer, and the parties may be put *in statu quo* whether in giving up the note the holder gave value or not. Some authority may be found opposed to the principal case. *President, etc. of Appleton Bank v. McGilvray*, 4 Gray (Mass.) 518. See *Whiting v. City Bank*, 77 N. Y. 363, 366. These cases intimate that a change of position such as a release of indorsers would be a good defense. Though the rule of the principal case is too universal to be changed, it is well to recognize that it is not due to an equality of equities between the parties, but merely to hesitancy in overturning transactions with commercial paper. See *National Bank of New Jersey v. Berral*, 70 N. J. L. 757, 760, 58 Atl. 189, 190. It may well be doubted whether this is here a sufficient reason to make an exception to the general rule. Cf. *Merchant's National Bank v. National Bank of the Commonwealth*, 139 Mass. 513, 2 N. E. 89.

CARRIERS — BAGGAGE — LIMITATION OF LIABILITY. — The plaintiff's ticket stated: "The company assumes no risk for baggage except for wearing apparel, and limits its responsibility to \$100." The plaintiff's baggage was lost while in the custody of the defendant's trainman, as he was assisting the plaintiff in changing cars. *Held*, that the limitation applies only to baggage regularly checked for the journey. *Hasbrouck v. New York Central & Hudson River R. Co.*, 202 N. Y. 363, 95 N. E. 808.

Although the terms of the contract limiting liability include all baggage, the decision that the limitation does not apply to hand baggage retained, except temporarily, by the passenger is undoubtedly correct. *Holmes v. North German Lloyd Steamship Co.*, 184 N. Y. 280, 77 N. E. 21. Cf. *Runyan v. Central R. Co. of New Jersey*, 61 N. J. L. 537, 41 Atl. 367. Contra, *Le Conte v. London & South Western Ry. Co.*, L. R. 1 Q. B. 54. The words must be strictly construed, for, first, the language is that of the carrier, and second, the limitation is in derogation of his common-law liability. *Mynard v. Syracuse, Binghamton, & New York R. Co.*, 71 N. Y. 180. Moreover, the distinction between baggage bailed to the carrier for the journey and that retained in the personal control of the passenger is clear. See NOTES, p. 178.

CARRIERS — BAGGAGE — PERSONAL EFFECTS RETAINED IN CONTROL OF PASSENGER. — Goods disappeared from the plaintiff's handbag while it was in the custody of a servant of the defendant railroad, who was assisting the plaintiff in changing cars. No explanation of the loss was offered. Held, that the defendant is liable for negligence, but not as an insurer. *Hasbrouck v. New York Central & Hudson River R. Co.*, 202 N. Y. 363, 95 N. E. 808. See NOTES, p. 178.

CARRIERS — LIMITATION OF LIABILITY — PUBLICATION IN INTERSTATE RATE SCHEDULES AS NOTICE BINDING SHIPPER. — The plaintiff, an interstate passenger of the defendant railroad, claimed as damages the actual value of baggage lost through the defendant's negligence. The defendant in compliance with the Interstate Commerce Act had filed with the Interstate Commerce Commission, and conspicuously published, schedules of rates and regulations with notice that it undertook to check free, baggage not exceeding a certain value. A higher rate was provided for baggage in excess of this value. The plaintiff did not know of the schedules or of any limitation of liability. Held, that she may recover the actual value of the baggage lost. *Hooker v. Boston & Maine R.*, 95 N. E. 945 (Mass.).

By the common law in Massachusetts one shipping baggage is not bound by stipulations for limitation of liability of which he is ignorant. See *Hood Co. v. American Pneumatic Service Co.*, 191 Mass. 27, 29, 77 N. E. 638. The extent of his recovery may, however, be restricted by express contract or assent to the regulations. *Bernard v. Adams Express Co.*, 205 Mass. 254, 91 N. E. 902; *Graves v. Adams Express Co.*, 176 Mass. 280, 57 N. E. 462. This is law quite generally. *Windmiller v. Northern Pacific Ry. Co.*, 52 Wash. 613, 101 Pac. 225. Contra, *Hughes v. Pennsylvania R. Co.*, 202 Pa. St. 222, 51 Atl. 990. See 1 HUTCHINSON, CARRIERS, 3 ed., §§ 401 *et seq.* The English law seems more favorable to the carriers in giving effect to notices of limitation not actually brought to the shipper's attention. See *Richardson, Spence, & Co. v. Rowntree*, [1894] A. C. 217, 219; *Parker v. South Eastern Ry. Co.*, 2 C. P. D. 416, 424. The Interstate Commerce Act requires schedules of rates and regulations to be filed and published. 3 U. S. COMP. STAT., 1901, Tit. 56 A, c. 1, § 6. The public are held to these rates and regulations when so filed and published regardless of knowledge of, or assent to, the rates. *Texas & Pacific Ry. Co. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628; *Melody v. Great Northern Ry.*, 25 S. D. 606, 127 N. W. 543. Whenever Congress has seen fit properly to legislate, the state law must give way. *Gulf, Colorado, & Santa Fé Ry. Co. v. Hesley*, 158 U. S. 98, 15 Sup. Ct. 802. But a stipulation of limited liability is not a rate nor a regulation, nor a necessary part of the schedule required by the act, so as to take the case out of the state law. It seems, therefore, that the Massachusetts common law, which requires assent to the stipulation, was properly held to apply in the principal case. Cf. *Miller v. Chicago, Burlington, & Quincy R. Co.*, 85 Neb. 458, 123 N. W. 449; *Fiedler v. Adams Express Co.*, 71 S. E. 99 (W. Va.).

CONFLICT OF LAWS — EFFECT AND PERFORMANCE OF CONTRACTS — WHAT LAW GOVERNS NOTICE OF DISHONOR TO INDORSER OF A NOTE. — The plaintiff was the holder of a promissory note payable in Canada, indorsed by the defendant in Illinois. Notice of dishonor was given in compliance with the law of Canada, but insufficient by the Illinois rule as to notes payable in Illinois, to charge the indorser. *Held*, that the defendant is liable upon his indorsement. *Guernsey v. Imperial Bank of Canada*, 188 Fed. 300 (C. C. A., Eighth Circ.).

There is a conflict of authority as to what law determines the time and sufficiency of notice of dishonor to charge the indorser. See note to *Spies v. National City Bank*, 61 L. R. A. 193, 217. The English cases hold that this is governed by the law of the place where the bill or note is payable. *Rothschild v. Currie*, 1 Q. B. 43; *Rouquette v. Overmann*, L. R. 10 Q. B. 525. This is the rule of the Bills of Exchange Act. STAT. OF 1882, 45 & 46 VICT. c. 61, § 72. The Negotiable Instruments Law has no provisions on conflict of laws, but the weight of American authority seems to prefer the law of the place of indorsement, on the ground that the contract is made there, and that due notice of dishonor according to the *lex loci contractus* is a condition precedent to any liability. *Aymar v. Sheldon*, 12 Wend. (N. Y.) 439; *Snow v. Perkins*, 2 Mich. 238. See STORY, CONFLICT OF LAWS, 8 ed., 440. *Contra*, *Wooley v. Lyon*, 117 Ill. 244, 6 N. E. 885. It is submitted that the Illinois rule is the more reasonable. The holder must act where the instrument is payable. To require that he find out the place of, and the law governing, each indorsement is a considerable burden. The indorser, on the other hand, always knows the place of payment and is free to protect himself accordingly.

CONSIDERATION — VALIDITY OF CONSIDERATION — CONSIDERATION MOVING TO PROMISOR FROM THIRD PERSON. — The directors of an insolvent corporation mutually agreed to forego their claims for directors' fees. The liquidator was a party to the agreement, although he gave no consideration in behalf of the corporation. *Held*, that the corporation can hold a director on the agreement. *West Yorkshire Darracq Agency, Limited v. Coleridge*, [1911] 2 K. B. 326.

There are conflicting *dicta* in early English cases as to whether a person can sue on a promise made to him, the consideration for which has moved from a third party. See *Pigott v. Thompson*, 3 B. & P. 147, 149; *Lilly v. Hays*, 5 A. & E. 548, 550. In cases of contracts for the benefit of one not a party to the contract, the fact that the beneficiary is a stranger to the consideration has in some decisions been the ground for denying him recovery. *Crow v. Rogers*, 1 Str. 592; *Tweedle v. Atkinson*, 1 B. & S. 393. But it would seem that the true ground is that no promise is given to the beneficiary. See *Price v. Easton*, 4 B. & Ad. 433, 435. It is submitted that the basis of the common-law rule requiring consideration is that a promise, if paid for, should be binding, whether it is paid for by a stranger or by the promisee. In the United States this result has been reached where the consideration is an act performed by a third party. *Palmer Savings Bank v. Ins. Co. of North America*, 166 Mass. 189, 44 N. E. 211; *Hamilton v. Hamilton*, 127 N. Y. App. Div. 871, 112 N. Y. Supp. 10. It has been held, also, in accord with the principal case, that the promisee can recover when the consideration is a promise by a third party. *Rector, etc. of St. Mark's Church v. Teed*, 120 N. Y. 583, 24 N. E. 1014. This result secures the intention of the parties, and, it is submitted, is correct.

CONSTITUTIONAL LAW — CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONS — CONSTITUTIONALITY OF AN APPELLATE COURT WITH FINAL JURISDICTION. — A state constitution provided that the judicial power should be vested in a Supreme Court, circuit courts, and such other courts as the General Assembly might establish. A statute gave to an Appellate Court final

jurisdiction of all but twenty-one classes of cases, including all actions for money damages. When two of the judges of that court considered erroneous a ruling precedent of the Supreme Court, the case was to be transferred to the latter. *Held*, that the statute is unconstitutional. *Ex parte France*, 95 N. E. 515 (Ind.).

It is well settled that only express provisions give to litigants a constitutional right to appeal. *People v. Richmond*, 16 Colo. 274, 26 Pac. 929; *Saylor v. Duel*, 236 Ill. 429, 86 N. E. 119. The legislature may usually vary, within wide limits, the jurisdiction even of constitutional courts. *Lake Erie & Western Ry. Co. v. Watkins*, 157 Ind. 600, 62 N. E. 443. The decision in the principal case must rest on the ground that the new powers of the Appellate Court deprive the Supreme Court of its supremacy. *Cf. Hildreth v. McIntire*, 1 J. J. Marsh. (Ky.) 206; *Court of Appeals*, 9 Colo. 623, 21 Pac. 471. It is not necessary to accept the argument of the Virginia court, that supremacy is entirely independent of jurisdiction. See *Sharpe v. Robertson*, 5 Grat. (Va.) 518, 604-608, 624-630. Lack of jurisdiction may make the authority of the court's opinions, its indestructibility and freedom from review, mere empty forms. Yet a constitutional court's greater authority, expressly recognized by the legislature as in this act, has more than a nominal value. The matter of jurisdiction is one of degree, but here, also, the field conferred upon the Appellate Court was apparently not as important as that of the older tribunal. It may fairly be said that the Supreme Court was still supreme, its jurisdiction legitimately limited in the interest of effective justice.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — STATUTE AUTHORIZING SUBPENA TO COMPEL PERSON IN ONE STATE TO TESTIFY IN ANOTHER. — A state statute authorized the granting of a *subpœna* to compel a person residing or being in the state to appear as witness in a prosecution for felony pending in any border state which had a similar statute, upon presentation to the judge issuing the *subpœna* of proof of the necessity of such witness, opportunity being given to the witness to appear before the judge to be heard in opposition thereto, and suitable provision being made for his expenses. *Held*, that the statute is constitutional. *Commonwealth of Massachusetts v. Klaus*, 130 N. Y. Supp. 713 (App. Div.).

The court overrules a former decision in the Supreme Court, Special Term, which declared this statute unconstitutional as depriving a person of liberty without due process of law. *Matter of Commonwealth of Pennsylvania*, 45 N. Y. Misc. 46, 90 N. Y. Supp. 808. See 18 HARV. L. REV. 466. There would seem to be ample provision for due process of law. The witness is allowed to be heard before the judge issuing the *subpœna* and ample indemnity is provided. The duty of a citizen to appear as a witness in judicial proceedings and the correlative right to compel him to appear have always been recognized. *In re Application of Clark*, 65 Conn. 17, 31 Atl. 522. The constitutionality of statutes recognizing the duty of a citizen to give testimony for use in other states and enforcing it to the extent of compelling him to make a deposition for the purpose is unquestioned. *In the Matter of United States Pipe Line Co.*, 16 N. Y. App. Div. 188, 44 N. Y. Supp. 713. The statute in the principal case is but an extension of the recognition of this duty, and whether enacted primarily to facilitate indirectly the administration of justice in the state itself, or for the facilitation of the administration of justice in general, as it does not violate any express constitutional provision, it must be held valid.

CONSTITUTIONAL LAW — PERSONAL RIGHTS: CIVIL, POLITICAL AND RELIGIOUS — ELECTIONS: DISCRIMINATION IN FORM OF BALLOT. — Chapter 649 of the New York Laws of 1911 provided that "if any person shall have been nominated by more than one political party . . . for the same office, his name

shall be printed but once upon the ballot"; and in the party column where his name is not printed shall be printed "see — column"; and to vote a "straight ticket" on such a party column, a mark shall be placed not only at the head of the column, but also opposite the place where such candidate's name is actually printed. *Held*, that the law is unconstitutional. *In the Matter of Hopper*, 46 N. Y. L. J. 221 (N. Y. Ct. App., Oct., 1911). See NOTES, p. 176.

CORPORATIONS — DISSOLUTION — DEVOLUTION OF REAL PROPERTY. — A social corporation not organized for profit purchased land and occupied it for seven years, when its activity ceased. The surviving trustee occupied it until the expiration of the corporation's charter. Then the heirs of the grantor, having acquired the rights of the other trustees in addition to their own, entered. The surviving trustee brought suit for partition. The members of the corporation at the time of its dissolution and their heirs intervened. *Held*, that the land should go to the members and heirs of members of the corporation at the time of its dissolution. *McAlhany v. Murray*, 71 S. E. 1025 (S. C.).

The rule set forth in *Coke* on Littleton, 13 *b*, that upon the dissolution of a corporation its realty reverts to the grantor is inapplicable to business or municipal corporations, or to social corporations in which the members have a pecuniary interest. *Bacon v. Robertson*, 18 How. (U. S.) 480; *Brookline Park Commissioners v. Armstrong*, 45 N. Y. 234; *Wilson v. Leary*, 120 N. C. 90, 26 S. E. 630. But innumerable *dicta* assert that it applies to charitable corporations. See *St. Philip's Church v. Zion Presbyterian Church*, 23 S. C. 297; *Mormon Church v. United States*, 136 U. S. 1, 47. Many text writers take *Coke's* view. See 1 BL. COMM. 484; 2 KENT COMM. 282, 307. And one decision sustains it. *Mott v. Danville Seminary*, 129 Ill. 403; 136 *id.* 289. But on the other hand, in the authorities which *Coke* cites as supporting his rule, only one *dictum* is to be found which warrants his general statement. See GRAY, RULE AGAINST PERPETUITIES, §§ 44-51 *a*. And the only English decision holds that the land escheats. *Johnson v. Norway*, Winch 37. This theory avoids the presentation to the grantor's heirs of undeserved wealth. It avoids also the objection under the statute of *Quia Emptores* to determinable fees. In South Carolina tenure exists, and the statute of *Quia Emptores* is not in force. See GRAY, RULE AGAINST PERPETUITIES, §§ 23, 27. Nevertheless land escheats to the state. 5 STAT. OF S. C., 1839, no. 1381, § 2; *City Council v. Lange*, 1 Mill (S. C.) 454. Hence this theory could apply. Nor is the principal case inconsistent with it, as the state is not a party to the suit.

CORPORATIONS — STOCKHOLDERS: INDIVIDUAL LIABILITY TO CORPORATION AND CREDITORS — NATURE OF LIABILITY IMPOSED BY STATUTE. — A statute imposed a double liability on stockholders of business corporations. A holder of debenture bonds sued a stockholder under this statute sixteen years after the corporation became insolvent. *Held*, that the cause of action is based on an implied contract, and is barred by the Statute of Limitations. *Little v. Kohn*, 185 Fed. 295 (Circ. Ct., E. D. Pa.).

A debt created by statute is considered a specialty debt, and the Statute of Limitations in question applied only to contracts without specialty. 2 PURDON'S DIG. (Pa.), 13 ed., 2282. But the liability in the principal case may be regarded as contractual or statutory. By consenting to become a stockholder a promise to assume the statutory liability may be implied. The courts recognize the dual nature of the liability. The constitutional provision against impairing the obligation of contracts applies. *Hawthorne v. Calef*, 2 Wall. (U. S.) 10. But on the other hand, in a recent case a married woman without capacity to contract was held as on a statutory liability. *Smathers v. Western Carolina Bank*, 71 S. E. 345 (N. C.). These cases were rightly decided, but on

a given point the liability should be consistently regarded as either contractual or statutory. On the point involved in the present case the decisions of the United States Supreme Court are in some confusion. *Carrol v. Green*, 92 U. S. 509; *Platt v. Wilmot*, 193 U. S. 602, 24 Sup. Ct. 542. The courts in general are divided. *Hancock National Bank v. Farnum*, 20 R. I. 466; *Cork & Bandon Ry. Co. v. Goode*, 13 C. B. 826; *Hawkins v. Furnace Co.*, 40 Oh. St. 507. The result reached in the principal case seems satisfactory and in accord with the principle that the extraordinary liability should not be imposed beyond the clear provisions of the statute. See *Gray v. Coffin*, 9 Cush. (Mass.) 192. It is supported by the weight of authority. It seems to be settled, however, that the double liability imposed by the National Banking Act is statutory. *McClaine v. Rankin*, 197 U. S. 154, 25 Sup. Ct. 410. See 18 HARV. L. REV. 620.

COVENANTS OF TITLE — COVENANT AGAINST ENCUMBRANCES AND COVENANT OF WARRANTY — WHETHER BROKEN BY TRESPASS. — A. sold growing timber to B. He then sold the land, on which the timber was growing, to C., and gave a full warranty deed. C. recorded his deed and thus deprived B. of any right in the trees. Nevertheless B. entered and cut them. C. sued A. for breach of warranty. *Held*, that C. can recover. *Thomas v. West*, 116 Pac. 1074 (Wash.).

The court placed its decision on the ground that the covenant against encumbrances was broken as soon as made, and that the covenant for quiet enjoyment was broken by a trespass, induced by the grantor. Clearly there is no merit in the first reason, for there was no encumbrance, *i. e.*, no "charge upon the land which would compel the grantee to pay money to relieve it." See *Redmon v. Phoenix Fire Ins. Co.*, 51 Wis. 292, 300, 8 N. W. 226, 229. *Cf. Marple v. Scott*, 41 Ill. 50, 61; *Wilkins v. Irvine*, 33 Oh. St. 138. The second point turns on the question whether the grantor can be said to have induced the first grantee to commit the trespass. For it is settled that a trespass by a third person is not a breach of the covenant for quiet enjoyment. *Hayes v. Bickerstaff*, Vaugh. 118. And, on the other hand, a trespass by the grantor or his agents is such a breach. *Seaman & Browning's Case*, 1 Leon. 157. Neither on principles of agency nor on the weight of authority should the grantor be held responsible for such acts of trespass as in the principal case. *Lamb v. Willis*, 125 N. Y. App. Div. 183, 109 N. Y. Supp. 75. To hold otherwise is to confuse a *causa sine qua non* with a legal cause.

CRIMINAL LAW — TRIAL — WAIVER OF USUAL PROCEDURE. — After all the evidence was in, one of the jurors was changed, and all the jurors were then sworn. The only evidence presented to these jurors was the reading of the testimony which had been taken before the original jurors. The accused consented to these proceedings. *Held*, that the conviction is illegal. *People v. Toledo*, 72 N. Y. Misc. 635, 130 N. Y. Supp. 440. See NOTES, p. 179.

DECEIT — GENERAL REQUISITES AND DEFENSES — LOSS OF DISPUTED CLAIM AS DAMAGE. — The plaintiff was induced by the misrepresentations of the defendant's agent to compromise for a small sum her claim against the defendant. The charge of the trial court required the plaintiff to prove only facts sufficient to warrant a reasonable belief in herself and the defendant that the claim was just. *Held*, that the charge should have required the plaintiff to prove that her claim was valid. *Urtz v. New York Central & H. R. R. Co.*, 95 N. E. 711 (N. Y.).

The damages in deceit should at least equal the loss incurred by the plaintiff. *Krumm v. Beach*, 96 N. Y. 398; *Smith v. Bolles*, 132 U. S. 125, 10 Sup. Ct. 39. The loss of a disputed claim has been recognized by the New York court as legal damage. *Gould v. Cayuga County National Bank*, 99 N. Y. 333, 2 N. E. 16. In estimating its value it would seem impracticable and contrary to

economic principle to take into account the actual outcome of the trial, of which all the parties were necessarily ignorant at the time of the representation. Thus in contracts the loss of an invalid claim has been held to be detriment. *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449. As there is, then, a certain loss, independent of the validity of the claim, the better rule today leaves to the jury the question as to its amount. *Wakeman v. Wheeler, etc. Co.*, 101 N. Y. 205, 4 N. E. 264. The evidence required by the lower court would seem sufficient to make this problem an easy one. Furthermore, if the upper court's decision is accepted, such a misrepresentation as this could in no case involve loss to the guilty party, while it would gain for him at least a delay in the prosecution of the suit against him.

EASEMENTS — MODES OF ACQUISITION — PAROL LICENSE ACTED ON. — The defendant orally agreed that a way should be opened across his land to give access to the public highway, which the plaintiff should have the right to use in common with the defendant and others as long as the defendant should live or own the land, if the plaintiff would build and keep in repair a necessary bridge. This the plaintiff did, and with the defendant used the road until the latter obstructed it with a fence. *Held*, that the defendant should be enjoined from obstructing the way. *Arbaugh v. Alexander*, 132 N. W. 179 (Ia.).

Under a parol license from the owner, the plaintiff telephone company erected a pole and wires on property, which, after two years, was acquired by the defendant railway company for its right of way. The plaintiff sues for damages for the cost of removing the wires from the pole and conducting them underground across the right of way at the request of the defendant. *Held*, that, since the license executed by the expenditure of money and labor has become irrevocable and, as an easement, is a burden on the estate in the hands of the defendant, the plaintiff should recover. *Indianapolis & C. Trac-tion Co. v. Arlington Tel. Co.*, 95 N. E. 280 (Ind.).

These cases illustrate the confusion in the law over parol licenses and parol agreements to grant an easement. *Mine La Motte, etc. Co. v. White*, 106 Mo. App. 222, 80 S. W. 356. Considerable authority apparently holds that an executed parol license is irrevocable. *Clark v. Glidden*, 60 Vt. 702, 15 Atl. 358; *Brantley v. Perry*, 120 Ga. 760, 48 S. E. 332. But the weight of authority is believed to be *contra*. *Hodgkins v. Farrington*, 150 Mass. 19, 22 N. E. 73; *Crosdale v. Lanigan*, 129 N. Y. 604, 29 N. E. 824. Many of the cases might have been put on the ground of enforcement in equity of parol agreements within the statute of frauds. *Pope v. Henry*, 24 Vt. 560; *Munsch v. Steller*, 109 Minn. 403, 124 N. W. 14. Thus numerous cases deny relief because the agreement was too indefinite or the part performance insufficient. *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Thoenke v. Fiedler*, 91 Wis. 386. Under these tests the Iowa case is well supported. *Flickinger v. Shaw*, 87 Cal. 126, 25 Pac. 268; *Van Horn v. Clark*, 56 N. J. Eq. 476, 40 Atl. 203. The Indiana case is distinguishable by the absence of a contract. See 13 HARV. L. REV. 54. It has been declared in cases involving parol gifts of land that without any contract jurisdiction exists to restrain unconscionable revocation resulting in irreparable injury. *Freeman v. Freeman*, 43 N. Y. 34; *Seavey v. Drake*, 62 N. H. 393. The application of this to parol licenses is usually met by the difficulty of finding in a mere permission any assurance of permanent enjoyment. *St. Louis National Stock Yards v. Wiggins Ferry Co.*, 112 Ill. 384; *Minneapolis Mill Co. v. Minneapolis & St. L. Ry. Co.*, 51 Minn. 304, 53 N. W. 639. It has been said that it must be implied from the nature of any license which requires a large and inherently permanent expenditure for its enjoyment. *Cook v. Pridgen*, 45 Ga. 331; *Decorah Woolen Mill Co. v. Greer*, 49 Ia. 490. But the facts of the Indiana case do not bring it within this doctrine.

INJUNCTIONS — ACTS RESTRAINED — OVERSTATEMENT OF MORTGAGE DEBT IN NOTICE OF SALE AS GROUND FOR INJUNCTION. — A substantial overstatement of the mortgage debt was made by a mortgagee in a notice of sale given in a foreclosure by advertisement. *Held*, that a temporary injunction restraining the sale until the amount of the debt is ascertained may issue in the discretion of the court. *Ekeberg v. Mackay*, 131 N. W. 787 (Minn.).

In this case there is no purely equitable right of redemption to give equity an exclusive jurisdiction. *Cf. Alston v. Morris & Co.*, 113 Ala. 506, 20 So. 950. However, unless the sale were restrained, the mortgagee would be able to bid the amount of the indebtedness claimed, without having to pay to the sheriff for the mortgagor the excess over the actual debt. REV. LAWS OF MINN., 1905, § 4466. To redeem under the statute, the mortgagor would have to tender the amount for which the land sold. *Dickerson v. Hayes*, 26 Minn. 100, 1 N. W. 834. It is true that the mortgagor could afterwards recover the excess at law. *Spottswood v. Herrick*, 22 Minn. 548. And this seems an adequate remedy for the money loss. But meanwhile the statutory right to redeem at the lower price, for which, if the notice had been correct, the land would probably have sold, is lost to him. Money damages for the loss of an interest in land being inadequate, equity protects that right *in specie*. The opportunity thus afforded mortgagors to delay a sale is a danger which may be guarded against by a proper exercise of the court's discretion.

INNKEEPERS — DUTIES TO TRAVELLERS AND GUESTS — WHO ARE GUESTS. — The plaintiff, a traveller, went to the defendant's inn and arranged to leave his horse there over night. He bought a drink of whisky and a cigar and departed. The horse was stolen that night without any fault of the defendant. *Held*, that the innkeeper is not liable. *Ticehurst v. Beinbrink*, 129 N. Y. Supp. 838 (Sup. Ct., App. T.).

In England and most American jurisdictions, including New York, an innkeeper is an insurer of his guest's property. *Morgan v. Ravey*, 6 H. & N. 265; *Hulett v. Swift*, 42 Barb. (N. Y.) 230, aff. 33 N. Y. 571. See BEALE, INNKEEPERS AND HOTELS, §§ 183-185. There is a conflict of authority as to whether a traveller, merely by leaving his horse at the inn, becomes a guest. The principal case, which seems to represent the sounder view, holds he is not a guest. *Healey v. Gray*, 68 Me. 489. The cases *contra* argue that the compensation due the innkeeper for feeding the horse is sufficient to make the owner a guest. See *Yorke v. Grenaugh*, 2 Ld. Raym. 866, 868; *Mason v. Thompson*, 9 Pick. (Mass.) 280, 285. They admit that the rule would be otherwise if the property were inanimate and no compensation were to be paid. See *Russell v. Fagan*, 7 Houst. (Del.) 389, 394, 8 Atl. 258, 260; *Yorke v. Grenaugh*, *supra*, 868. Compensation, therefore, seems to be the basis of these decisions. That should make the innkeeper liable as a bailee for hire, but it hardly seems that the contract of bailment should make the bailor a guest when he himself neither boards nor lodges at the inn and does not intend to do so. *Ingallsbee v. Wood*, 33 N. Y. 577. The fact that the plaintiff bought drink, if it established the relation of innkeeper and guest, should not affect the result of the case, for the relation had ceased at the time of the loss. *Hoffman v. Roessle*, 39 N. Y. Misc. 787, 81 N. Y. Supp. 291. See *Clark v. Ball*, 34 Colo. 223, 82 Pac. 529.

INSURANCE — WAIVER OF CONDITIONS — CONDITION FOR PARTIAL FORFEITURE. — A sick benefit policy provided that the insured's failure to notify the insurer of the illness within a certain time should limit the latter's liability to one-fifth of the amount it would otherwise have to pay. After breach of this condition the insurer denied any liability. *Held*, that the insurer may set

up the breach of condition as to notice. *Dewey v. National Casualty Co.*, 72 N. Y. Misc. 23, 129 N. Y. Supp. 136 (Sup. Ct.).

One reason for the doctrine of waiver in insurance law is that forfeiture would otherwise be occasioned to the insured. See *Graham v. Security Mutual Life Ins. Co.*, 72 N. J. L. 298, 303, 62 Atl. 681, 683. A limitation of the amount of indemnity, as in the principal case, is not an attempt to proportion the insurer's liability to the loss incurred by the insured, but is clearly a provision for a partial forfeiture. If the case is analogous to cases of total forfeiture for breach of condition, it is opposed to the current of authority. *Brink v. Guaranty Mutual Accident Association*, 28 N. Y. St. Rep. 921, 7 N. Y. Supp. 847; *Metropolitan Accident Association v. Froiland*, 161 Ill. 30, 43 N. E. 766. Nor is it in accord with cases of partial forfeiture for breach of analogous conditions. *Thompson v. St. Louis Mutual Life Ins. Co.*, 52 Mo. 469.

INSURANCE — WAIVER OF CONDITIONS — CONDITION POSTPONING LIABILITY. — A policy of fire insurance postponed the insurer's liability to pay to the end of a certain period of time. Within that period, the insured brought suit. Before this action, but after the fire, the insurer had denied liability on the ground that the insured possessed no insurable interest in the premises. Held, that the action is premature. *Irwin v. Ins. Co. of North America*, 116 Pac. 294 (Cal., Ct. App.).

This case is opposed to two legal theories. The first is the insurance doctrine of waiver and estoppel. In applying that doctrine, a distinction might have been taken between absolute defenses and conditions which merely postpone liability; for only the former produce the forfeitures abhorred by insurance law. However, no such distinction has been made. *State Ins. Co. v. Maackens*, 38 N. J. L. 564; *Edwards v. Fireman's Ins. Co.*, 43 N. Y. Misc. 354, 87 N. Y. Supp. 507. The principal case also infringes the somewhat doubtful doctrine of anticipatory breach of contracts. *Hochster v. De la Tour*, 2 E. & B. 678. *Contra, Daniels v. Newton*, 114 Mass. 530.

INSURANCE — WAIVER OF CONDITIONS — INSURER'S COURSE OF DEALING PRIOR TO ISSUANCE OF POLICY. — A complaint on an annual credit insurance policy stated that the plaintiff, the insured, had broken the condition for proof of loss, but that for a number of years the defendant had written similar policies for the plaintiff and had never made full compliance with the condition necessary. Held, that the complaint is demurrable. *Shedd v. American Credit-Indemnity Co.*, 95 N. E. 316 (Ind., App. Ct.).

In at least three types of cases have waiver and estoppel been predicated upon an insurer's course of conduct relative to a condition, or another condition similar to the condition, subsequently broken by the insured. The dealings may have been between the insurer and insured under the very policy involved. *Hartford Life Ins. Co. v. Unsell*, 144 U. S. 439, 12 Sup. Ct. 671. The insurer's acts may have referred to conditions in concurrent policies issued to the same insured person. *Home Protection of North Alabama v. Avery*, 85 Ala. 348, 5 So. 143. Or the insurer may have been dealing with other policy holders. *Estes v. Ins. Co.*, 67 N. H. 462, 33 Atl. 515. *Contra, Haupt v. Phoenix Life Ins. Co.*, 110 Ga. 146, 35 S. E. 342. A possible fourth type involves the breach of a condition in a policy issued subsequently to the insurer's conduct. See *Ins. Co. v. Plato*, 23 Ohio Circ. Ct. Rep. 35. It differs from the other types in that the condition in the new policy may notify the insured that the insurer will enforce the condition. Such notice is effective. *Brown v. Pennsylvania Casualty Co.*, 207 Pa. St. 609, 56 Atl. 1125. But the insurer may have disregarded the condition in so many prior policies that its insertion in a subsequent policy is ineffective as notice. It might be held that such conduct is not alleged in the principal case. However, it professes to decide that there cannot be waiver and estoppel of the fourth type.

INTERSTATE COMMERCE — CONTROL BY STATES — CONSTITUTIONALITY OF INTRASTATE RAILROAD RATES. — The railroad of the plaintiff company was located wholly within the state of Virginia, but was operated almost entirely for interstate business. An order of the state corporation commission fixed a maximum passenger rate of two and one-half cents a mile for all railroads within the state. At this rate, the plaintiff's intrastate traffic would not make a fair return on the capital invested, but the earnings from interstate business were sufficient to afford a fair return on the total capital. The plaintiff had been voluntarily doing its passenger business in Virginia, both intrastate and interstate, at an average of 2.35 cents per mile. The plaintiff appealed from the order of the commission. *Held*, that the unreasonableness of the rate fixed by the commission is not established. *Washington Southern Ry. Co. v. Commonwealth*, 71 S. E. 539 (Va.).

A state has no power to establish railroad rates applying to interstate transportation. *Wabash, St. Louis & Pacific Ry. Co. v. Illinois*, 118 U. S. 557. It cannot fix intrastate rates which do not provide a fair return to the railroad for the use of its property. *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U. S. 418; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362. From a combination of these propositions it follows that justification for a confiscatory intrastate rate cannot be found in the large profits of interstate business. *Smyth v. Ames*, 169 U. S. 466. See 12 HARV. L. REV. 50. The principal case declares that this settled law cannot apply where the intrastate business is insubstantial and incidental, it being impracticable to determine on what proportion of the whole capital it should earn a fair return. But it has been held that, in determining rates, capital simultaneously used in both classes of business should be apportioned between them in proportion to respective revenue. *St. Louis & S. F. R. Co. v. Hadley*, 168 Fed. 317; *Missouri, K. & T. Ry. Co. v. Love*, 177 Fed. 493. Apparently that method should have been employed in this case. The result, however, may be right, on the ground that the company did not furnish sufficient data for making the computation. *Steenerson v. Great Northern Ry. Co.*, 69 Minn. 353, 72 N. W. 713. The court relies on the adoption of similar rates by the railroad, but, except to strengthen the presumption of reasonableness, that cannot affect the constitutionality of the rates ordered by the commission.

MORTGAGES — EQUITABLE MORTGAGES — POSSESSION OF MORTGAGOR AS NOTICE. — A. gave B. a deed of conveyance of land, absolute in form. They agreed at the time that B. should reconvey to A. when A. repaid B. for discharging certain incumbrances on the land. A. remained in actual possession. B. mortgaged the land to C. *Held*, that A.'s possession is notice to C. of A.'s interest in the land. *Teal v. Scandinavian-American Bank*, 131 N. W. 486 (Minn.).

It is well settled that a deed of conveyance, absolute on its face, but intended by the parties as security for a debt, is in equity a mortgage. *Oberdorfer v. White*, 78 S. W. 436 (Ky.). It is also a general rule that possession is constructive notice of the possessor's interest in the land and puts prospective dealers with the title on inquiry. *Niles v. Cooper*, 98 Minn. 39, 107 N. W. 744. The principal case applies this rule to a grantor remaining in possession after a full conveyance. But the decided majority of cases and the better reason are *contra*. *Exon v. Dancke*, 24 Or. 110, 32 Pac. 1045. The effect of possession being to put a prospective purchaser on inquiry, it would seem that any inquiry suggested in the principal case is sufficiently answered by the possessor's own deed to B. *Eylar v. Eylar*, 60 Tex. 315. The natural presumption in such a case is that the grantor's possession is merely permissive and perfectly consistent with title in the grantee. *Brigham v. Thompson*, 12 Tex. Civ. App. 562. Since the principal case does not present any circumstances rebutting that presumption, it gives too great effect to the grantor's continuance in possession.

MORTGAGES — PRIORITIES — RIGHT OF JUNIOR MORTGAGEE TO RENTS AND PROFITS. — The plaintiff, a junior mortgagee, in an action to foreclose, had a receiver appointed to collect the rents and profits of the mortgaged premises. Later a prior mortgagee had the receivership extended to cover his foreclosure action, and asked that the rents and profits previously collected be applied in repairs and taxes. *Held*, that they need not be so applied, but belong to the plaintiff. *Madison Trust Co. v. Axt*, 130 N. Y. Supp. 371 (App. Div.).

The junior mortgagee takes by this decision merely what the mortgagor would have taken if left in possession. See *JONES, MORTGAGES*, § 667. As respects his immediate predecessor in line he is himself practically a mortgagor, as his claim rests entirely upon what that predecessor left to the mortgagor. See 1 HARV. L. REV. 55, 62. Accordingly he should be accountable to subsequent but not to prior encumbrancers for his collections. *Leeds v. Gifford*, 41 N. J. Eq. 464. *Contra, Holabird v. Burr*, 17 Conn. 556. Each prior mortgagee has the right to dispossess those behind him, but until he does so he has no right to the rents and profits. *Sanders v. Lord Lisle*, Ir. Rep. 4 Eq. 43. A Virginia case has held that a receiver must act in the interest of all parties and pay the various claimants according to their priorities, even though appointed on the application of a junior mortgagee alone. *Beverley v. Brooke*, 4 Grat. (Va.) 187. It seems fairer to give the junior encumbrancer the reward of his diligence. *Ranney v. Peyser*, 83 N. Y. 1. A receiver appointed at his instance ought, as in the principal case, to collect for his benefit alone, until the prior encumbrancer takes possession himself or has the receivership extended to cover his suit. *Howell v. Ripley*, 10 Paige (N. Y.) 43; *Washington Life Ins. Co. v. Fleischauer*, 10 Hun (N. Y.) 117.

PUBLIC SERVICE COMPANIES — REGULATION OF PUBLIC SERVICE COMPANIES — VALUATION OF WATER RIGHTS AND FRANCHISE AS BASIS FOR DETERMINING RATES. — A state statute required a board of supervisors to fix maximum water rates to be charged by irrigation companies, upon the basis of the value of the property used in the appropriation and furnishing of water. *Held*, (a) that a water right is not a property right upon which the plaintiff company is entitled to an income; (b) that the company's franchise is to be valued as a basis for returns. *San Joaquin & Kings River Canal & Irrigation Co. v. County of Stanislaus*, Circ. Ct., N. D. Cal. See NOTES, p. 173.

RECORDING AND REGISTRY LAWS — NOTICE BY RECORD — DELIVERY OF MORTGAGE TO RECORDING CLERK AS CONSTRUCTIVE NOTICE. — A chattel mortgage was not recorded until a month after it was mailed to the county clerk. After the clerk received the mortgage but before he recorded it, the defendant purchased the chattel in good faith. *Held*, that his title cannot be defeated by the mortgagee. *Bamberg v. Harrison*, 71 S. E. 1086 (S. C.).

By many statutes, delivery of a mortgage for record to the proper official constitutes constructive notice. *Throckmorton v. Price*, 28 Tex. 605; *Zeiner v. Edgar Zinc Co.*, 79 Kan. 406, 99 Pac. 614. Generally, even without an affirmative provision, the purchaser is charged with notice after such delivery. *Appleton Mill Co. v. Warder*, 42 Minn. 117, 43 N. W. 791. See *Parker v. Palmer*, 13 R. I. 359, 363. This view — that the mortgagee, having done all reasonably to be required of him, should not suffer from the clerk's remissness — is aided by decisions that recording protects the mortgagee although the record is destroyed. *Shannon v. Hall*, 72 Ill. 354; *Marlet v. Hinman*, 77 Wis. 136, 45 N. W. 953. Opposing decisions reason that the mortgagee occupies a better position for verifying the record than the purchaser. *State ex rel. Slocomb v. Rogillio*, 30 La. Ann. 833. Cf. *Terrell v. Andrew County*, 44 Mo. 309. And if

recording is constructive notice because examination of the records would give actual notice, the purchaser should be able to rely upon them safely. *Lessee of Jennings v. Wood*, 20 Oh. 261. Many statutes, however, like the one in the principal case, make mortgages recorded within a specified time valid against purchasers although the purchase is within that time. CODE OF S. C., 1902, § 2456. Such statutes seem to prescribe the diligence necessary on the part of the mortgagee and to be complied with sufficiently by deposit of the mortgage for record. The principal case, however, follows the settled rule in its jurisdiction. *Burriss v. Owen*, 76 S. C. 481, 57 S. E. 542.

RIGHT OF PRIVACY — INFRINGEMENT OF THE RIGHT — PUBLICATION OF PORTRAIT IN NEWSPAPER. — The defendant newspaper published a picture of the plaintiff without her consent in connection with an article concerning charges of crime against her father. *Held*, that the plaintiff cannot recover. *Hillman v. Star Pub. Co.*, 117 Pac. 594 (Wash.).

The case swings the numerical weight of American authority against recognition of the right of privacy in absence of statute. For a recent case *contra*, see 24 HARV. L. REV. 680; for a discussion of the principles involved, see 4 HARV. L. REV. 193.

STATUTE OF FRAUDS — PART PERFORMANCE — ACCEPTANCE OF RENT AS RATIFICATION OF LEASE. — The petitioner's agent, without the written authority required by statute, made a written lease of the petitioner's premises to the defendant for five years. The defendant took possession under the lease and the petitioner for two years accepted the rents when due. *Held*, that the petitioner cannot oust the defendant on thirty days' notice. *Matter of Di Marti*, 72 N. Y. Misc. 148 (Sup. Ct.).

Apart from any element of equitable estoppel, the ratification by a principal of a contract for lease of lands made by his agent must be in writing, when the statute provides that such agent must be appointed in writing. *Long v. Poth*, 16 N. Y. Misc. 85, 37 N. Y. Supp. 670. *Cf. Johnson v. Fecht*, 185 Mo. 335, 83 S. W. 1077. But *cf. Hammond v. Hannin*, 21 Mich. 374. However, part performance under a lease invalid under the statute may be sufficient ground for preventing the lessor from setting up the statute. *Gibbs v. Horton Ice Cream Co.*, 61 N. Y. App. Div. 621, 71 N. Y. Supp. 193. Taking possession and paying rent has been held sufficient. *Trammell v. Craddock*, 100 Ala. 266, 13 So. 911; *Walsh v. Rundlette*, 9 D. C. 114. But in the principal case it is not shown that the tenant has not received full value by use and occupation for the rent paid. Thus it would seem that part performance must here rest upon possession alone. *Contra, Eaton v. Whitaker*, 18 Conn. 222. But, it is submitted, mere possession should not be sufficient ground for disregarding the statute unless dispossessing the lessee would impose irreparable hardship upon him. *Henley v. Cottrell Real Estate, etc. Co.*, 101 Va. 70, 43 S. E. 191. See *Miller v. Ball*, 64 N. Y. 286, 292. But *cf. Cooper v. Newton*, 68 Ark. 150, 157, 56 S. W. 867, 870. As it is not shown that such hardship would accrue in the principal case, the lease should not be taken out of the statute. See 22 HARV. L. REV. 384; 20 HARV. L. REV. 335. However, if the rent was payable at a yearly rate, the decision would be correct, as a tenancy from year to year would have been established. *Coudert v. Cohn*, 118 N. Y. 309, 23 N. E. 298. *Cf. Julian v. Berardini*, 49 N. Y. Misc. 119, 96 N. Y. Supp. 1064.

TAXATION — PROPERTY SUBJECT TO TAXATION — DOWER NOT SUBJECT TO INHERITANCE TAX. — A suit was brought to collect an inheritance tax upon the defendant's dower under a statute taxing all property passing "under the intestate laws." *Held*, that dower is not subject to the tax. *Crenshaw v. Moore*, 137 S. W. 924 (Tenn.). See NOTES, p. 181.

TAXATION — REMEDIES FOR WRONGFUL TAXATION — INTERPLEADER. — The executors of a will were taxed on the estate in Boston, as executors, and in three other municipalities, as trustees. They filed a bill in equity, making the four municipalities defendants and seeking to compel them to interplead and determine the validity of the several assessments. *Held*, that the bill does not lie. *Welch v. City of Boston*, 94 N. E. 271 (Mass.). See NOTES, p. 174.

TORTS — ERECTION OF SPITE FENCE TO INTIMIDATE LITIGANT. — The defendant, who had been temporarily enjoined at the suit of a neighbor from keeping dogs on his land, threatened to erect a twenty-foot fence on the plaintiff's line unless she desisted from prosecuting the suit. The plaintiff persisted and the fence was erected. Having failed to remove the dogs, the defendant was fined for contempt. *Held*, that an amended petition for the removal of the fence should be granted. *Wilson v. Irwin*, 138 S. W. 373 (Ky.).

The order requiring the removal of the fence is obviously not a means of bringing pressure to bear on the defendant to perform the first decree. Moreover, it can scarcely be contended that it constitutes punishment for the criminal contempt of court involved in the attempted intimidation of the plaintiff, since such punishment has been limited to fine and imprisonment. See OSWALD, CONTEMPT OF COURT, ch. XIII. The only ground, therefore, on which the decision can be supported is that the malicious erection of the fence was a violation of a right of the plaintiff for which the redress to be obtained in a suit at law was inadequate. In many jurisdictions such a right is recognized. *Bayer v. Barrington*, 151 N. C. 433, 66 S. E. 439. *Contra, Russel v. State*, 32 Ind. App. 243, 69 N. E. 482. *Cf. Burke v. Smith*, 69 Mich. 380, 37 N. W. 838. The absence of any doubt in the present case that injury to the plaintiff was the sole motive inducing the erection of the fence negatives one of the strongest grounds on which relief has been denied to the plaintiff in the cases denying the right. Indeed, in a previous case involving similar facts this very court held that no action lay. *Saddler v. Alexander*, 21 Ky. L. Rep. 1835, 56 S. W. 518.

VESTED, CONTINGENT, AND FUTURE INTERESTS — LIABILITY OF FUTURE INTERESTS IN PERSONALTY FOR OWNER'S DEBTS. — Personal property was bequeathed to trustees for the use of the testator's wife during her natural life, and after her death to be divided between the testator's son and daughter, if they should survive his wife and attain the age of twenty-five years. A creditors' suit was instituted in the lifetime of the widow and before the children had reached twenty-five, to compel the sale of the son's interest to satisfy a judgment against him. *Held*, that the plaintiff is entitled to this relief. *National Park Bank v. Billings*, 144 N. Y. App. Div. 536, 129 N. Y. Supp. 846. See NOTES, p. 171.

WITNESSES — FEES — WHAT IS ATTENDANCE UPON COURT. — The plaintiff was summoned to testify before a police court, and, being unable, since he was a stranger in the town, to furnish security for his appearance at the next term of court, was detained in jail. *Held*, that he can recover fees for the period of detention. *Kirke v. Strafford County*, 80 Atl. 1046 (N. H.).

Statutes compensating witnesses for their services uniformly fix *per diem* fees for attendance upon court. PUB. STAT. AND SESS. LAWS OF N. H., 1901, c. 287, § 13; CODE OF IA., 1897, § 4661; 1 PUB. GEN. LAWS OF MD., 1904, Art. 35, § 11. The conflict of authority in the case of a witness imprisoned for failure to obtain security is therefore only explicable as a difference in construction of the term "attendance." Some courts construe it strictly to mean attendance upon the court when in session, and deny recovery for the period of detention. *Marshall County v. Tidmore*, 74 Miss. 317, 21 So. 51; *State ex rel. Sawyer v. Greene*,

91 Wis. 500, 65 N. W. 181. This rule, however, has been changed by statute in one state. 2 WIS. STAT., 1898, § 4060. Another court denying recovery regards the witness as at fault, on the ground that the committing magistrate must have found him to be a person who could not be trusted to discharge his duty to the state by appearing voluntarily. *Markwell v. Warren County*, 53 Ia. 422, 5 N. W. 570. The courts followed in the principal case regard him as more unfortunate than at fault, and hold the confinement to be constructive attendance within the statute. *Hall v. County Commissioners of Somerset County*, 82 Md. 618, 34 Atl. 771; *Robinson v. Chambers*, 94 Mich. 471, 54 N. W. 176. It would seem fair, apart from the question of statutory construction, that the witness, if he can prove himself not at fault in failing to secure bail, should recover for the time of imprisonment.

BOOK REVIEWS.

THE RECORDS OF THE FEDERAL CONVENTION OF 1787. Edited by Max Farrand. In three volumes. New Haven: Yale University Press. 1911. pp. xxv, 606; 667; 685.

Here is presented, in the first two volumes, a convenient and painstaking view of the various contemporaneous accounts of the proceedings of the Federal Convention. The plan is to present day by day the various accounts. The official Journal is always placed first. Next comes Madison. The fragmentary records of Yates, King, and others follow. The editor has frequently found it difficult to determine what is the proper text of the Journal and of Madison; and numerous foot-notes indicate the more important points of textual criticism. It is explained that there is frequent difficulty in attaching to the proper questions the Journal's tabular records of yea and nay votes; and the embarrassment is obvious from a glance at the photograph opposite page 32 of the first volume. The difficulties as to Madison's Debates are obvious both from the annotations in these volumes and from the typographical devices adopted long ago in the third volume of the United States Government's Documentary History of the Constitution. The editor says truly enough that as to both the Journal and Madison there is opportunity for error; but an examination of these volumes shows that here the chance of error has been reduced to a minimum. Both for the care exercised and for the convenient arrangement of the text the editor will receive the thanks of all persons who realize how easy it is to prepare volumes of this sort in a way that exasperates.

The third volume consists of appendices and indices. The first appendix presents more than four hundred extracts throwing light upon the proceedings and persons of the Federal Convention; and beyond question these extracts — for example those on pages 87 and 232 giving character sketches of the delegates — contain the matter that will most easily appeal to the general reader. The other appendices present, among other things, the Virginia Plan, the Pinckney Plan, the New Jersey Plan, and the Hamilton Plan. These plans are accompanied with comments and annotations. When the editor has done so much, it may seem like unreasonable overreaching to intimate a regret that he did not indicate his reasons for ignoring Nott's "The Mystery of the Pinckney Draught." After the appendices comes the "Index by Clauses of the Constitution." This may well be deemed the key to the whole work and the editor's greatest aid to the investigator; for here, clause by clause, are references to all the places where the three volumes throw light upon the several topics. The volume ends with a General Index, which, besides aiding in the

use of the other index just now described, makes it easy to find allusions to persons and especially to trace the work of each delegate.

From what has been said, it should be clear that these three volumes are indispensable to anyone who is searching at first hand for any fact as to the transactions of the Federal Convention. The Convention itself did all that it could to keep its discussions and votes secret; and now almost a century and a quarter later these volumes reverse the process and with great ingenuity do all that can be done to make each step of the proceedings public.

CRIME: ITS CAUSES AND REMEDIES, Being Volume 3 of the Modern Criminal Science Series. By Cesare Lombroso. Translated by Henry P. Horton. Boston: Little, Brown and Company. pp. xlvii, 451.

In this day of general complaint over the administration of the criminal law, it is cause for congratulation that such a body of men as comprise the American Institute of Criminal Law should have undertaken the task of guiding reform, not by haphazard experimentation, but by scientific methods. The present translation cannot properly be regarded as an isolated work, but as part of a series designed, as the committee of the Institute on translations states, to "furnish the American student of criminal science a systematic and sufficient acquaintance with the controlling doctrines and methods that now hold the stage of thought in Continental Europe."

One cannot discuss Lombroso's writings other than as a whole, and as a whole showing the way toward a revulsion from the tenets of the so-called classical school of criminologists, which measured punishment by the crime, not the criminal. Lombroso's works are epochal in outlining the idea of individualization of punishment, and the search for causes of crime, with a view to prevention and repression. While the distinction may seem trite enough to criminologists, its significance is so little appreciated by the American public, and so little even by the American bar as a whole, that restatement is still permissible. How far the subordination of the individualization concept to the necessity of social defense against crime may cause the pendulum of the future to swing back in this country will depend much upon the enlightenment and wisdom of those who make daily practice of the modern theory on the bench and at the bar.

The present work is described by the author as a supplement to his earlier work — "The Criminal Man." Many of his readers will deem it, rather, an amendment, but it is at least just to say that his earlier views have been finally adjusted, the earlier work having given disproportionate weight to anthropological data supposed to confirm his first theory that crime denotes atavism. The present work enlarges upon social and physical influences, which in the trend of modern thought are assuming much the larger importance.

The first half of the work deals with the ætiology of crime, successive chapters being devoted to the influences of climate, geology, race, civilization, density of population, subsistence, alcoholism, education, economics, religion, heredity, age, sex, and other specific contributing causes. The wealth of data available for these studies in Continental Europe is calculated to impress the American reader with the relative paucity of such information available in this country. It is much to be desired that the systematic beginnings of scientific compilation of judicial criminal statistics made in the censuses of 1903 and 1910 may continue.

It is in the second half of the work, however, that the American reader will find his chief interest. It is in two parts, the first dealing with the prophylaxis and therapeutics of crime, the second with synthesis and application. The first

part deals largely with preventive measures adapted to reduce sexual crimes, frauds, alcoholism, crimes resulting from influences of poverty and wealth, and religious, educational, and political conditions; also with the results of faulty penal and procedural methods; the second contains a suggestive outline of conditions which should determine the application of penal and quasi-penal measures, with relatively brief reports of their practical results.

Many of these suggestions the average American reader may deem unsuited to social, economic, and industrial conditions here, still their value for use in the New World is only partially impaired, for in dealing with criminals the knowledge of what not to do is an important thing, and this knowledge is gained quite as much in practical experience, European as well as American, as in pure theory.

Again, the cosmopolitan character of the population of many of our great cities renders valuable any information as to the penological conditions obtaining in the countries whence the foreign elements have come, and this volume abounds in such data. It is gratifying to note in passing the author's commendation of the probation system, a distinctly Massachusetts product.

There is an adequate introductory summary, by Professor Parmelee, of the earlier and connected work "The Criminal Man," and the book-work, as is to be expected of these publishers, is excellent.

W. B.

MANUAL OF POLITICAL ETHICS. By Francis Lieber. Second Edition, Revised and Edited by Theodore D. Woolsey. In two volumes. Philadelphia and London: J. B. Lippincott Company. 1911. pp. 472; 459.

These two formidable volumes suggest but do not elucidate the manner of Francis Lieber's life and work. Born in Berlin in 1800, he volunteered for the campaign of 1815 under Blücher, fought at Ligny, and was twice wounded during the advance on Paris. To his generous mind, as to that of many another German youth, the reaction in Prussia which came with peace was a cruel disappointment. He promptly joined the liberal student movement and was as promptly harried from university to university by the police. Twice he was imprisoned. Between terms of confinement he went to Greece and offered his services against the Turks. Finally, persecuted out of Germany, he came to the new world. Here he laid aside his sword and armed himself instead with the pen. While in Boston he edited and in considerable part wrote the *Encyclopædia Americana*. In Columbia, South Carolina, where he taught in the State University for nearly twenty years, he produced the work under review, and also his *Legal and Political Hermeneutics* and a book on *Civil Liberty and Self-Government*. His opinions were not highly appreciated in South Carolina, however, and in 1856 he moved to New York where he joined the faculty of Columbia University and remained until his death. Throughout the struggle with the South, although his sons fought in both armies, he was the trusted adviser of the Union administration. As such he prepared the *Instructions for the Government of the Armies of the United States in the Field*, a landmark on the road toward legal mitigation of the hardships of war.

Thus much has been written of the author's life because it serves to indicate the value and limitations of the work under review. Lieber was too much a man of action to write on political theory a treatise of the first rank. But, for the same reason, he was incapable of fanatic or fantastic speculation. The *Political Ethics* opens with a long demonstration that man is a rational and moral individual. Then the author proceeds to define Natural Law as a body of rights which may be deduced from this essential nature of man. Politics proper he takes to be the science which ascertains the best means of securing

these rights "both according to the result and conclusion of experience, and the demands of existing circumstances." The development of the foregoing propositions, together with an illuminating treatise on "The State," calculated to explain and elaborate them, constitutes the first part of the book. With explanation and elaboration, however, these definitions seem hopelessly general. But it must be admitted that here the author sins in respectable company. Not even Locke was specific when he wrote of man's "Natural Right" to property, liberty, and life. What this "Right" may be at any particular time and place is the ever-recurring problem of community existence. We live in the hope that we are approximating its solution more and more closely. But no quite satisfactory definitions of "Natural Law" and "Natural Rights" have ever yet been penned. Lieber is suggestive and sound as far as he goes. For the careful student there is much of value in this theoretical portion of his work.

The second part of the Manual, devoted to "Political Ethics Proper," reflects Lieber nearly at his best. "By what moral principles ought we to be guided in specific political cases?" This question the author undertakes to answer in relation to the more important exigencies of political life as he knew it. He balks at no difficulties, and, at times, his conclusions somewhat shock the worthy editor. Thus Lieber justifies lying to an enemy and even poisoning wells in war time. (He completely abandoned the latter position in his Army Instructions.) But these are exceptional and extreme cases. Most of the questions which he deals with he illumines by practical comment, varied illustration, and sound and convincing judgment. The argument, though not always conclusive, never fails to be enlightening. No man can turn these pages, even casually, without profit. And yet the Manual of Political Ethics, in its present form, is likely to be esteemed rather than read. Much of the discussion is too prolonged and some of it is out of date. The work should be re-edited. It was written over seventy years ago, and such revision and editing as the present edition displays was done in 1873. We are still interested in woman suffrage and in the dangers of excessive party zeal, but who cares to read forty pages on the right of legislatures to instruct United States senators? Lieber's general principles should be preserved as he wrote them, together with as many of his specific observations as relate to living questions. But obsolete details and comment thereon should be eliminated or relegated to foot-notes. When this has been done, we shall have more reading of a sane, thoughtful, interesting and helpful book and not so much loose talk about its being a classic.

H. A. Y.

SIX ROMAN LAWS. Translated with Introduction and Notes by E. G. Hardy, M.A., D.Litt., Fellow and Tutor of Jesus College, Oxford. Oxford: The Clarendon Press. 1911. pp. vii, 176.

In this little book we have clear and accurate translations of six important monuments of Roman legislation with respect to public law. The laws translated are: *Lex Acilia Repetundarum*, *Lex Agraria*, *Lex Antonia de Termessibus Majoribus*, *Lex Municipii Tarentini*, *Lex Rubria de Gallia Cisalpina*, and *Lex Julia Municipalis*. The text used is the sixth edition of Bruns' *Fontes Juris Romani antiqui*. This is not the latest edition; but as the author says, no changes in the text of these laws appear in the seventh edition. The purpose of the translation is to permit students of history to use these important sources, without the labor of translating the unfamiliar legal phraseology and of wrestling with the numerous and difficult problems presented by gaps and lacunæ. These gaps and the conjectural restorations by which they have been filled are not indicated, so that the book must be a companion to Bruns rather than a substitute therefor. But the introductions and some of the notes

have independent value, and the introduction to the *Lex Acilia Repetundarum* is of value to the student of Roman procedure. As we are interested in Roman private law rather than Roman public law, lawyers are likely to have less use for the book than historians — for whom, indeed, it was prepared.

R. P.

EQUITY, ITS PRINCIPLES IN PROCEDURE, CODES, AND PRACTICE ACTS. The Prescriptive Constitution. By William T. Hughes. St. Louis: Central Law Journal Company. 1911. pp. xxiii, 610.

This book is written after the manner of the work on "Procedure" and that on "Grounds and Rudiments of Law" by the same author, and is intended to be supplementary to those works. A little over half of the book contains the text, the other portion being devoted to an elaborate text-index like that contained in the "Grounds and Rudiments of Law." The author dwells at great length upon the distinction between the mandatory and statutory records, vigorously maintaining the sanctity of the former under the "Prescriptive Constitution" or "higher law." As in his former treatises, Mr. Hughes finds his principles enunciated in Latin maxims which he asserts to be derived from the Civil Law, but many of which are, it would seem, of modern origin and peculiar to the common law. He restates his six "trilogies" which are already familiar to the readers of his earlier works.

Mr. Hughes is indefatigable in reading the cases, careful and exact in digesting them, original in his terminology and presentation, and logical in his reasoning. Many students of the law, however, and among them the writer of this review, are utterly unable to agree with his premises. They are inclined to doubt the existence of the "higher law" and to question the sacredness of the mandatory judicial record, and are inclined to regard many of the rules of pleading as technical and narrow and resulting from historical accident. A great deal of sound law, however, it must be admitted, has been collected between the covers of the book and forcefully and clearly presented. A. W. S.

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RELEASES AND COVENANTS NOT TO SUE JOINT, OR JOINT AND SEVERAL DEBTORS.

THE subject of joint contracts is regarded as an elementary one in the law of contracts, yet its difficulties have received singularly little discussion either in treatises on the law of contracts or in essays. The fullest treatment of the matter is perhaps to be found in books on the law of partnership. But it is not always easy, where a partnership is concerned, to be sure how far peculiar rules of partnership may have affected the general principles of joint contracts.

No questions in regard to joint indebtedness are perhaps more troublesome than those suggested by the heading of this article. There are involved not only the rights of the creditor against the debtors, but also the rights of the debtors against each other, and not infrequently the cross rights which one of the debtors may acquire against the creditor by virtue of a covenant given by the latter. Further, law and equity have sometimes laid down rules at least apparently inconsistent in regard to the same question, thereby creating confusion; and in modern times statutes, sometimes sweeping and sometimes very partial in their operation, have repealed or qualified rules of the unwritten law. As none of the statutes in force in England or in this country purport wholly to change or to abolish the legal effects of the relationship between debtors which give rise to the questions involved in joint, and in joint and several indebtedness, the only practical way to consider

the law in any jurisdiction is first to get a clear conception of the rules of the unwritten law and then to consider the effect of such statutes as may have been passed.¹

Effect of a release upon the creditor's rights.

It has been settled for centuries that a release of one joint debtor discharges all.² The reason for this rule is that a joint duty is one and indivisible. Therefore if A., B., and C. are jointly liable, any discharge of A., since it prevents thereafter a liability of A., B., and C. together and since that was the only liability which originally existed, destroys all liability. Another reason has often been given why the release of one joint debtor should discharge the others; namely, that the right of contribution of the other joint debtors against the one released would be thereby wrongfully discharged. This reason, however, is unsound because the rights of contribution between the several debtors depend on their relation to each other, or their agreements with each other. The creditor has no power to change either the relation or the agreements even with the coöperation of one of the debtors. A more refined and exact variation of this reason has been thus stated:

"The reason why a simple release of the principal debtor discharges the surety is, that it would be a fraud on the principal debtor to profess to release him, and then to sue the surety, who in turn would sue him."³

Doubtless there are equitable reasons why any binding agreement with a principal debtor will affect the rights of the creditor

¹ Professor Burdick, in a very useful and learned article in 11 Col. L. Rev. 101, has collected the statutes which provide for a joint and several liability in the case of partners and, in some jurisdictions, in the case of other joint debtors, but as will be seen from the present article the subject of joint and several liabilities is by no means free from all of the technicalities which exist in the case of purely joint liabilities.

² Co. Litt., vol. ii, 232 a; *Lacy v. Kinaston*, 1 Ld. Raym. 688; s. c. 12 Mod. 548 (1701); *Clayton v. Kynaston*, 2 Salk. 573 (1699); *Lacy v. Kynaston*, 2 Salk. 575 (1701); *Dean v. Newhall*, 8 T. R. 168 (1799); *Ex parte Good*, 5 Ch. D. 46, 57 (1876); *Duck v. Mayeu*, [1892] 2 Q. B. 511, 513; *Johnson v. Collins*, 20 Ala. 435 (1852). Cf. *Carroll v. Corbitt*, 57 Ala. 579 (1877); *Clark v. Mallory*, 185 Ill. 227, 56 N. E. 1099 (1900); *Bonney v. Bonney*, 29 Ia. 448 (1870); *Hale v. Spaulding*, 145 Mass. 482, 14 N. E. 534 (1887); *Merritt v. Buckman*, 90 Me. 146, 37 Atl. 885 (1897); *Yates v. Donaldson*, 5 Md. 389 (1854); *Munyan v. French*, 60 N. J. L. 12, 36 Atl. 771 (1897); *Wills Point Bank v. Bates*, 76 Tex. 329, 13 S. W. 309 (1890).

³ Mellish, L. J., in *Nevill's Case*, L. R. 6 Ch. 43, 47 (1870). See also *Carroll v. Corbitt*, 57 Ala. 579 (1877).

against a surety, and the explanation just quoted may partially explain the reason of this rule. But it is conceived that the rule relating to the release of one joint debtor does not depend on equitable principles or on the law of suretyship. Joint debtors as between themselves may be each liable primarily for a ratable share of the debt and as a surety for the remainder; or one may be primarily liable for the whole debt and the others may be merely sureties. But as a matter of pure common law it is believed that in every case alike, a release of one of the debtors, whether principal or surety, or partly principal and partly surety, discharges the others. Certainly the release of one joint co-surety is a legal discharge of the obligation of the other or others.⁴ And an examination of the early cases discloses no inquiry or consideration of possible suretyship relations which the joint debtor released may have borne to his co-debtors.⁵

It is often said that nothing but a technical release under seal of a joint debtor discharges the obligation of the other joint debtors.⁶ Such statements, however, necessarily involve the assumption that nothing but a release under seal can operate as a legal discharge of the original obligation. This assumption was true at common law if that obligation was a contract under seal for the payment of money, or was a contract under seal for the performance of any other act than the payment of money provided the time for performance had not yet come;⁷ and it is in regard to such sealed instruments that the statement was originally applicable that nothing but a technical release under seal of a joint debtor would discharge the others.⁸ At the present time when in most juris-

⁴ *Nicholson v. Revill*, 4 A. & E. 675 (1836); *Evans v. Bremridge*, 2 Kay & J. 174, 183 (1855); *Kearsley v. Cole*, 16 M. & W. 128, 136 (1846); *Price v. Barker*, 4 E. & B. 760, 777 (1855); *Ward v. Nat. Bank*, 8 App. Cas. 755, 764 (1883); *Mercantile Bank v. Taylor*, [1893] A. C. 317; *People v. Buster*, 11 Cal. 215 (1858); *Spencer v. Houghton*, 68 Cal. 82, 8 Pac. 679 (1885); *Deering v. Moore*, 86 Me. 181, 29 Atl. 968 (1893); *Lower v. Buchanan Bank*, 78 Mo. 67, 69 (1883).

⁵ See citations *supra*, note 2.

⁶ *Hartley v. Manton*, 5 Q. B. 247 (1843); *Ex parte Good*, 5 Ch. D. 46 (1876); *Browning v. Grady*, 10 Ala. 999 (1847); *Evans v. Carey*, 29 Ala. 99 (1856); *McAllester v. Sprague*, 34 Me. 296 (1852); *Shaw v. Pratt*, 22 Pick. (Mass.) 305 (1839); *Gold Medal Sewing Machine Co. v. Harris*, 124 Mass. 206 (1878); *DeZeng v. Bailey*, 9 Wend. (N. Y.) 336 (1832); *Morgan v. Smith*, 70 N. Y. 537, 543 (1877); *Burke v. Noble*, 48 Pa. St. 168 (1864).

⁷ *Wald's Pollock, Contracts*, 3 ed., 835.

⁸ See *Webb v. Hewitt*, 3 Kay & J. 438, 443 (1857).

dictions the effect of seals has been largely or wholly abolished by statute, and when even in other jurisdictions an accord and satisfaction may generally be pleaded at law as a bar to all kinds of sealed contracts,⁹ it may be doubted whether many courts could fairly save the liability of a joint debtor even on a sealed contract where his co-debtor had been discharged by parol on sufficient consideration, though the sealed contract was for the payment of money, or the parol discharge was made before breach of the contract. However this may be, if a joint contract is not of the sort just alluded to, any agreement for good consideration with one of the joint debtors will operate everywhere, if so intended, as an immediate cancellation at law of his liability,¹⁰ and therefore should have the same effect as a release under seal in discharging the other joint debtors. Undoubtedly a mere agreement to forbear or an unexecuted accord would not have this effect; but any legal bar against one joint debtor will operate as a bar against the others. This has been so held in regard to an accord and satisfaction;¹¹ and similarly where a statute provided that proof by a creditor under a general assignment should bar him from any subsequent action against the assignor, a creditor who proved his claim against one joint debtor who had made such an assignment was held thereby to discharge the other.¹²

Not only are all joint debtors discharged by a release of one of them, but the same rule is applicable to joint and several debtors. The joint as well as the several liability of all the debtors is discharged. This was early decided,¹³ and the modern rule is the same.¹⁴ It is less easy to find a technically satisfactory reason for the rule in case of joint and several debtors than in case of joint

⁹ Wald's Pollock, Contracts, 3 ed., 835.

¹⁰ Wald's Pollock, Contracts, 3 ed., 828, 834.

¹¹ *In re E. W. A.*, [1901] 2 K. B. 642.

¹² *Munyan v. French*, 60 N. J. L. 12, 36 Atl. 771 (1896).

¹³ *Cocke v. Jennor*, Hob. 66, pl. 69 (1724); *Hammon v. Roll*, March 202 (1642); *Windham's Case*, 5 Coke 7 (1489). See also *Co. Litt.* 232 a. *Clayton v. Kynaston*, 2 Salk. 573, 574 (1699).

¹⁴ *In re E. W. A.*, [1901] 2 K. B. 642; *United States v. Thompson, Gilp.* (U. S.) 614 (1836); *Garnett v. Macon*, 2 Brock. (U. S.) 185, 220 (1825); *Hochmark v. Richler*, 16 Colo. 263, 26 Pac. 818 (1891); *Bonney v. Bonney*, 29 Ia. 448 (1870); *Bradford v. Prescott*, 85 Me. 482, 486, 27 Atl. 461 (1893); *American Bank v. Doolittle*, 14 Pick. (Mass.) 123 (1833); *Frink v. Green*, 5 Barb. (N. Y.) 455 (1849); *Crawford v. Roberts*, 8 Or. 324 (1880).

debtors where there is no several obligation. The reason given in the early cases is that a release is as complete a satisfaction in law as performance. This reason seems somewhat artificial. To the modern mind a release of one debtor is not necessarily a release or satisfaction of the debt itself. Perhaps the early conception of a release as a conveyance or grant of an indebtedness as if that were tangible property may explain why three or four centuries ago it might seem to have this effect.¹⁵ It may be granted that a release of a joint and several debtor is properly to be construed as a release not only of his several liability but also of his joint liability. Even so, except on the supposition that the debt itself has been granted away, it is not easy to see why the several liability of the debtors not released should be extinguished. The correctness of the early rule, however, does not seem to have been seriously questioned.¹⁶

As the rule discharging all joint debtors, whether also severally liable or not, if one of them is released, is a technical rule which undoubtedly more often than not violates the intention of the parties to the release, it might be thought that equity would give relief from the application of the rule where it worked injustice and violated the intention of the parties. In support of such a contention might be cited the practice of courts of equity in giving relief in certain instances against the technical rule that a deceased joint debtor's estate is freed from liability to the creditor. Relief in such a case was originally based on a presumption that there had been a mistake of the parties in making a joint contract rather than a joint and several one. Such a presumption if made in every case, is, of course, based on a fiction and if consistently applied would lead to the result that a joint contract means one thing in equity and another at law. But equity has never professed to create a different substantive law of contracts from that established at law, and at the present time unless there is some ground in fact on which to base an allegation of mistake, English courts of equity at least seem to apply the same rules of survivorship in joint contracts as

¹⁵ See Professor Ames in 9 HARV. L. REV. 56; Wald's Pollock, Contracts, 3 ed., 358, n. 98.

¹⁶ "It is too late now to question the law — that where the obligation is joint and several, the release of one of two joint debtors has the effect of releasing the others." *In re E. W. A.*, [1901] 2 K. B. 642, 648.

do courts of law,¹⁷ though the creditor's right to equitable relief finds some support in this country.¹⁸ Whatever may be the rule in equity concerning survivorship, it is clear that English courts of equity, at least, do not now give, and never have given, relief from the effect of a release of one joint or joint and several debtor. Lord Hardwicke said: "There is no doubt but a release to one joint obligor is a release in equity to both as well as at law";¹⁹ and very recently it has been held that an accord and satisfaction with one joint and several debtor precludes proof of the claim in bankruptcy against another,²⁰ though equitable rights have always been recognized in bankruptcy proceedings, and though the English Judicature Act adopts for all cases the rule of equity where that differs from the rule at law. This failure of equity to relieve from the effect of a release finds analogy in the failure of equity to relieve from the legal effect of a judgment against one or more joint debtors in merging the debt and thereby precluding any action against other debtors."²¹

Nevertheless, there can be no doubt that a more equitable result would have been reached if courts having equitable powers had assumed that a release of a joint or of a joint and several debtor, was intended by the parties as a release merely of the debtor to whom the release was given, and had given effect to that intention. Even upon such a construction the creditor's rights against the other co-debtors would not in every case have been reserved, for the question is affected not simply by the technical rule of the common law, but also by the rule which courts of equity have established for the protection of sureties that any discharge or binding agreement to forbear proceedings against a principal debtor discharges a surety since otherwise the burden which he had assumed might be increased or varied.²²

¹⁷ See Griffith, Joint Rights and Liabilities, 47-55; Ames, Cases on Suretyship, 137, 138, n.; and as to partnership debts, Professor Burdick in 11 Col. L. Rev. 102-114. If the deceased debtor was a surety it has always been well settled that equity will give no relief against the rule of law and, therefore, the surety's debt is discharged. See Griffith, Joint Rights and Liabilities, *ubi supra*; Davis v. Van Buren, 72 N. Y. 587 (1878); Richardson v. Draper, 87 N. Y. 337 (1882), and cases therein cited.

¹⁸ Ames, Cases on Suretyship, 138, n.

¹⁹ Bower v. Swadlin, 1 Atk. 294 (1738).

²⁰ *In re E. W. A.*, [1901] 2 K. B. 642.

²¹ Kendall v. Hamilton, 4 App. Cas. 489 (1879).

²² See Brandt, Suretyship, § 164, 376 *et seq.*

In the case of joint debtors, or of joint and several debtors, there is always some relation of principal and surety between the parties. One or more of the obligors may have entered into the obligation merely to accommodate one or more of the others. In such a case there is an uncomplicated relation of principal and surety. But even where all the debtors are interested in the debt, each is to some extent a principal debtor, but also each is acting as surety for the others to the extent that the equitable duty to pay belongs to them.²³ Accordingly a court of equity could not properly wholly relieve against the rule that a release of one co-debtor discharges the others, except where the debtor released was merely a surety. This result has been reached in a few decisions in the United States.²⁴ Where the joint debtors as between one another are liable equally or in other proportions for the debt, equity should not allow a release of one to relieve the others from liability except to the extent of the share of the debtor released. As to this share the other debtors were merely sureties. This result has been reached in several cases where the joint debtors were co-sureties.²⁵ No reason for a different rule is apparent where the joint debtors are principals, for such co-debtors like co-sureties are, as between one another, principals as to a portion of the debt and sureties as to the rest.²⁶ No decisions have been found, however, which apply the principle suggested upon this point, but it has been adopted by statute in some states.²⁷

Effect of a covenant not to sue or a qualified release upon the creditor's rights.

A covenant not to sue a debtor or to forbear perpetually has from early times been held a bar to the original cause of action.²⁸

²³ In the case of partnership obligations, if the partnership is regarded as an entity, the direct obligation would be that of the firm and the obligation of the individual partners would be as sureties for the firm.

²⁴ *Carroll v. Corbitt*, 57 Ala. 579 (1877); *Schock v. Miller*, 10 Pa. St. 401 (1849); *Bridges v. Phillips*, 17 Tex. 128 (1856); *McIlhenny v. Blum*, 68 Tex. 197, 4 S. W. 367 (1887). See also *Burke v. Noble*, 48 Pa. St. 168 (1864).

²⁵ *Gordon v. Moore*, 44 Ark. 349 (1884); *Smith v. State*, 46 Md. 617 (1877); *State v. Matson*, 44 Mo. 305 (1869); *Massey v. Brown*, 4 S. C. 85 (1872). See also *Morgan v. Smith*, 70 N. Y. 537 (1877). But see *Draper v. Weld*, 13 Gray (Mass.) 580 (1859) and cases cited *supra*, p. 205, n. 4.

²⁶ See *infra*, p. 214 and note 49.

²⁷ See *infra*, p. 221.

²⁸ *Hodges v. Smith*, Cro. Eliz. 623 (1598); *Smith v. Mapleback*, 1 T. R. 441, 446

This is to avoid circuity of action, for, if the plaintiff in the original action should recover, the defendant could recover precisely the same damages back for breach of the covenant not to sue or to forbear. Instead of permitting the double action, the court provides the same effect more simply by giving judgment for the defendant in the original action. But in case of a covenant not to sue one of several joint debtors, the intention of the parties can be attained only by enforcing in terms both the original promise and the later covenant. By so doing the obligee retains his right of action at law against all the joint debtors, becoming liable in turn to the one to whom the covenant not to sue or to forbear was given for any damage which the latter may suffer by the breach of covenant. If no part of the judgment obtained against the joint debtors is satisfied out of the property of the covenantee, such damages can only be nominal. Accordingly such a covenant given to one joint obligor does not have the effect of a release and the debt is not discharged.²⁹

The same effect is given to a release which contains an express reservation of the obligee's rights against the other joint debtors.³⁰

(1786); *Ford v. Beech*, 11 Q. B. 852 (1848); *Flinn v. Carter*, 59 Ala. 364 (1877); *Jones v. Quinipiack Bank*, 29 Conn. 25 (1860); *Guard v. Whiteside*, 13 Ill. 7 (1851); *Peddicord v. Hill*, 4 T. B. Mon. (Ky.) 370 (1827); *Foster v. Purdy*, 5 Met. (Mass.) 442 (1843); *Stebbins v. Niles*, 25 Miss. 267 (1852); *Line v. Nelson*, 38 N. J. L. 358 (1876); *Phelps v. Johnson*, 8 Johns. (N. Y.) 54 (1811); *Thurston v. James*, 6 R. I. 103 (1859).

²⁹ *Fitzgerald v. Trant*, 11 Mod. 254 (1710); *Lacy v. Kinnaston*, Holt 178 (1701); s. c. 1 Ld. Raym. 688; s. c. 2 Salk. 575; s. c. 3 Salk. 298; s. c. 12 Mod. 548; *Dean v. Newhall*, 8 T. R. 168 (1799); *Hutton v. Eyre*, 6 Taunt. 289 (1815); *Duck v. Mayeu*, [1892] 2 Q. B. 511, 513; *Garnett v. Macon*, 2 Brock. (U. S.) 185, 220 (1825); *Roberts v. Strang*, 38 Ala. 566 (1863); *Kendrick v. O'Neil*, 48 Ga. 631 (1873); *Haney & Campbell Mfg. Co. v. Adaza Creamery Co.*, 108 Ia. 313, 79 N. W. 79 (1899); *Lane v. Owings*, 3 Bibb (Ky.) 247 (1813); *Mason v. Jouett's Admr.*, 2 Dana (Ky.) 107 (1834); *McLellan v. Cumberland Bank*, 24 Me. 566 (1845); *Bradford v. Prescott*, 85 Me. 482, 487, 27 Atl. 461 (1893); *Shed v. Pierce*, 17 Mass. 622 (1822); *Durell v. Wendell*, 8 N. H. 369 (1836); *Benton v. Mullen*, 61 N. H. 125 (1881); *Rowley v. Stoddard*, 7 Johns. (N. Y.) 207 (1810); *Catskill Bank v. Messenger*, 9 Cow. (N. Y.) 37 (1828); *Bank of Chenango v. Osgood*, 4 Wend. (N. Y.) 607 (1830); *Couch v. Mills*, 21 Wend. (N. Y.) 424 (1839).

³⁰ *Solly v. Forbes*, 2 B. & B. 38 (1820); *Thompson v. Lack*, 3 C. B. 540, 551 (1846); *Price v. Barker*, 4 E. & B. 760 (1855); *Bateson v. Gosling*, L. R. 7 C. P. 9 (1871); *Green v. Wynn*, L. R. 7 Eq. 28 (1868), L. R. 4 Ch. 204 (1869); *Northern Ins. Co. v. Potter*, 63 Cal. 157 (1883); *Parmelee v. Lawrence*, 44 Ill. 405 (1867); *Dupee v. Blake*, 148 Ill. 453, 35 N. E. 867 (1893); *Gardner v. Baker*, 25 Ia. 343 (1862); *Bradford v. Prescott*, 85 Me. 482, 486, 27 Atl. 461 (1893); *Dickinson v. Bank*, 130 Mass. 132

In fact such a release is in terms contradictory. If it is to be regarded as a true release of one joint debtor, it would be legally impossible to reserve rights against the others.³¹ The whole debt would be discharged. In order to give effect to the manifest intention of the parties as nearly as possible, the courts have therefore held that a release with such a reservation is in legal effect no release at all, but merely a covenant not to sue.³²

The same doctrine has been applied in any case where it appears from the terms of a release that it was not intended or expected that all the debtors should be released.³³ Parol evidence, however, showing an intent to reserve rights against other joint obligors has been held inadmissible.³⁴ But if the evidence is clear of a parol agreement with the released debtor that the creditor's remedies against the other debtors should be reserved, a bill in equity to reform the written release should be sustained.³⁵

Effect of covenants and qualified releases where one joint debtor is a surety.

Though a covenant not to sue or a qualified release does not have the effect as such of discharging other debtors than the one to whom it was given, its effect must also be considered with reference to the equitable principle of suretyship previously alluded to.

An agreement to give time to a principal debtor, the surrender of collateral to him, or any other act or agreement with him which will increase or vary the risk of the surety, discharges the latter from liability.³⁶ Joint debtors as between one another may bear

(1881); *Benton v. Mullen*, 61 N. H. 125 (1885); *Hubbell v. Carpenter*, 5 N. Y. 171 (1851); *Greenwald v. Kaster*, 86 Pa. St. 45 (1878); *Russell v. Adderton*, 64 N. C. 417 (1870).

³¹ See *Nicholson v. Revill*, 4 A. & E. 675 (1836); *Kearsley v. Cole*, 16 M. & W. 128 (1846); *Webb v. Hewitt*, 3 Kay & J. 438 (1857); *Green v. Wynn*, L. R. 4 Ch. 204 (1869).

³² *Bradford v. Prescott*, 85 Me. 482, 27 Atl. 461 (1893).

³³ *Ex parte Good*, 5 Ch. D. 46, 55 (1876); *Carroll v. Corbitt*, 57 Ala. 579 (1877); *Bradford v. Prescott*, 85 Me. 482, 27 Atl. 461 (1893); *Hale v. Spaulding*, 145 Mass. 482, 14 N. E. 534 (1888); *Burke v. Noble*, 48 Pa. St. 168 (1864).

³⁴ *Mercantile Bank v. Taylor*, [1893] A. C. 317; *Clark v. Mallory*, 185 Ill. 227, 56 N. E. 1099 (1900); *Hale v. Spaulding*, 145 Mass. 482, 14 N. E. 534 (1888). But see *contra*, *Massey v. Brown*, 4 S. C. 85 (1872).

³⁵ *Bank of Montreal v. McFaul*, 17 Grant Ch. (U. C.) 234.

³⁶ *Brandt, Suretyship*, § 376 *et seq.*

the relation of principal debtor and surety for the whole debt, or they may be bound as between one another to bear the debt in equal proportions or in any other proportions.

In so far then as a creditor chooses to give time and even more clearly in so far as he chooses to covenant never to sue a joint debtor who is the principal debtor, he will be unable thereafter to charge a surety for the same debt. But the principle which discharges the surety is an equitable one and is subject to equitable modifications. If a surety consents to a discharge or change of liability of the principal debtor, he cannot claim exemption from liability.³⁷ It has also been established that the surety cannot claim exemption if the agreement with the principal debtor reserves in effect to the surety all rights of indemnification to which he is entitled, and this is the legal effect of an agreement which reserves to the creditor a right against the surety, as well as of an agreement which in terms reserves the surety's rights against the principal debtor.³⁸ The rule which permits a creditor to make a covenant not to sue or to release a principal debtor known to be such and nevertheless by a reservation of the creditor's rights against co-debtors, still hold them bound, though they are sureties and known to be such, is in reality inconsistent in principle with the rule that an agreement with the principal debtor to forbear or to give time discharges the surety. This latter rule must rest on the injustice of holding a surety bound when the creditor has varied the terms of the obligation. The injustice is no less because the creditor when he varies the obligation agrees with the principal debtor but without the consent of the surety that the surety shall not be discharged. If it be urged that where the right against the surety is reserved, his right of indemnity against the principal is also reserved, and that therefore the surety is not injured, the reply is obvious that the surety's right of indemnity can never be taken away from

³⁷ Brandt, Suretyship, § 379 *et seq.*; Ames, Cases on Suretyship, 150, n.

³⁸ Bateson v. Gosling, L. R. 7 C. P. 9 (1871); Mueller v. Dobschuetz, 89 Ill. 176, 182 (1878): "An agreement which preserves the right of the creditor to proceed against the surety, or the right of the surety to proceed against the principal, will not discharge the surety," citing Rucker v. Robinson, 38 Mo. 154 (1866); Morse v. Huntington, 40 Vt. 488, 496 (1868); Price v. Barker, 4 E. & B. 760 (1855); Kearsley v. Cole, 16 M. & W. 128 (1846); Viele v. Hoag, 24 Vt. 46 (1851); Hubbell v. Carpenter, 5 N. Y. 171 (1851). Numerous other cases to the same effect might be cited in which the principal and surety were severally but not jointly bound. This can involve no distinction in principle. See Ames, Cases on Suretyship, 150, n.

him in any case without his consent, and that therefore, if the continued existence of the right of indemnity justifies the creditor in changing the terms of his contract with the principal, no agreement to give time to the principal should discharge the surety. The fact will always remain that after a covenant with the principal debtor whether or not there is an express reservation of rights against the surety, not only the surety's right of subrogation if he chooses or is compelled to pay the debt is injuriously affected, but also the chance which he is called upon to face is different after the covenant has been made than it was before. After such a covenant the creditor's rights against the principal debtor are different from what they were previously, and that such a change is unjust to the surety is the only reasonable basis for ever holding him discharged by the giving of time.

Though it is not possible to reconcile the general rule forbidding the giving of time with the special rule permitting it without the surety's consent if the creditor's right against the surety is expressly reserved, at least it is possible to show how the inconsistency arose. The general rule forbidding the giving of time is a modern one in equity.³⁹ Its recognition at law is still more modern.⁴⁰ About a century before such a doctrine was heard of even in equity, it had been laid down that a covenant not to sue one joint debtor did not discharge the others.⁴¹ Before the adoption by courts of law of the rule protecting sureties from agreements between creditor and principal debtor for forbearance a case had presented the question of the effect of a release of one joint debtor with a reservation of rights against another.⁴² The court purported merely to

³⁹ "The doctrine that an agreement to give time to the principal discharges the surety in equity seems to be a comparatively modern notion. The editor has not discovered any earlier instances of the application of the doctrine than Lord Thurlow's decision in 1789, in the case of *Nisbet v. Smith*, 2 Bro. C. C. 579, which was followed by *Rees v. Berrington* (1795), 2 Ves. Jr. 540; *Boulton v. Stubbbs* (1810), 18 Ves. 20; *Bowmaker v. Moore* (1816), 3 Price, 214; *Eyre v. Bartrop* (1818), 3 Mad. 221. In all of the cases just cited the surety was a specialty obligor." Ames, *Cases on Suretyship*, 156, n.

⁴⁰ In *Dean v. Newhall*, 8 T. R. 168 (1799), and *Hutton v. Eyre*, 6 Taunt. 289 (1815), covenants to discharge a joint debtor known to be the principal debtor were held not to bar the creditor from proceeding against the other joint debtors, though they were sureties, and the covenants contained no reservation of rights against the latter.

⁴¹ *Lacy v. Kinnaston*, Holt 178 (1701); s. c. 1 Ld. Raym. 688; s. c. 12 Mod. 548; s. c. 2 Salk. 575; s. c. 3 Salk. 298; *Fitzgerald v. Trant*, 11 Mod. 254 (1710).

⁴² *Solly v. Forbes*, 2 B. & B. 38 (1820).

construe a release in terms contradictory and held it to amount in effect to a covenant not to sue one joint debtor, and, therefore, under well-recognized law to have no effect on the liability of his co-debtor. The doctrine of this case persisted and was even applied to cases where the joint debtor against whom rights were reserved was a surety, while side by side with this doctrine there flourished the newly arisen doctrine discharging sureties if time was given to the principal debtor. Lord Eldon was thought to recognize the right of the creditor in equity to reserve his rights against the surety.⁴³ Baron Parke added the weight of his authority,⁴⁴ and the matter must now be considered settled,⁴⁵ however unsatisfactory may be the attempts to reconcile two conflicting doctrines.

As a creditor may release one joint debtor and expressly reserve rights against the other, so in the case of joint and several obligations, a creditor may release the several liability of one or more of the debtors with a reservation of the joint right.⁴⁶ And the joint liability may be released with a reservation of the several right.⁴⁷

Importance of the creditor's knowledge of a suretyship relation between joint debtors.

Another principle also besides the form of the covenant or release qualifies the right to be discharged of a joint debtor who in fact is a surety. A creditor who has received the joint obligation of several persons, unless he has actual knowledge of their relation to one another, cannot be justly required to regard the obligation as anything less or different from what it appears to be. On the face of a joint obligation the apparent liability of each obligor is for an *aliquot* part of the whole debt as a principal debtor, and as a surety of the remaining co-obligors for the rest of the debt. As there can be no question of the discharge of one joint debtor by a covenant not to sue another except in so far as the former is a surety, it follows that a creditor of several joint obligors who is ignorant of any special relation of principal and

⁴³ *Ex parte Gifford*, 6 Ves. 805 (1802); *Boulton v. Thomas*, 18 Ves. 20 (1810).

⁴⁴ *Kearsley v. Cole*, 16 M. & W. 128 (1846).

⁴⁵ See cases cited *supra*, p. 212, n. 38.

⁴⁶ *Thompson v. Lack*, 3 C. B. 540, 549 (1846).

⁴⁷ *North v. Wakefield*, 13 Q. B. 536 (1849); *Stevens v. Stevens*, 5 Exch. 306 (1850).

surety between them may reasonably assume that their liability to each other is to pay the debt in equal shares; and an agreement by him to give time, or never to sue, made with one of the joint debtors could not have the effect of discharging the others to a greater extent than from all liability for the payment of the proportionate share of the one debtor with whom the agreement was made. But in fact the law seems to be that a covenant not to sue one of several joint principal debtors does not effect a discharge of the others even to this extent. Though it is sufficiently obvious upon principle that joint debtors who are under equal obligations as between one another to pay the debt are principals for a ratable share, and sureties as to the remainder, and though such joint debtors are recognized to be sureties for one another as to a ratable proportion of the debt in any litigation between them for contribution,⁴⁸ the rule forbidding the creditor to give time to a principal debtor is held inapplicable in such cases. Thus it is said

"where two or more execute a note for a joint liability they are in some respects sureties for each other, but the principle upon which a surety in the proper sense of the term is exonerated from liability by a contract with the principal, giving date of payment without the assent of the surety, has never been applied in such a case."⁴⁹

The same point is involved also in decisions which lay down broadly that a covenant not to sue a joint debtor who in fact is in part a principal does not discharge the others, though their liability beyond their ratable shares is that of sureties, even though there is no express reservation of the creditor's rights against them.⁵⁰

⁴⁸ See *Clark v. Dane*, 128 Ala. 122, 28 So. 960 (1900).

⁴⁹ *Neel v. Harding*, 2 Met. (Ky.) 247, 250 (1859), quoted and followed in *Mullendore v. Wertz*, 75 Ind. 431 (1881). To the same effect is *Parsons v. Harrold*, 46 W. Va. 122, 124, 32 S. E. 1002 (1899). See also *Draper v. Weld*, 13 Gray (Mass.) 580 (1859).

⁵⁰ The other obligors were held still bound, though the question of suretyship was not discussed, in *Roberts v. Strang*, 38 Ala. 566 (1863); *Kendrick v. O'Neil*, 48 Ga. 631 (1873); *Mason v. Jouett's Admr.*, 2 Dana (Ky.) 107 (1834); *McLellan v. Cumberland Bank*, 24 Me. 566 (1845); *Bradford v. Prescott*, 85 Me. 482, 487 (1893); *Shed v. Pierce*, 17 Mass. 622, 628 (1822); *Durell v. Wendell*, 8 N. H. 369 (1836). See also *First Nat. Bank v. Cheney*, 114 Ala. 536, 21 So. 1002 (1896). In *Dean v. Newhall*, 8 T. R. 168 (1799); *Hutton v. Eyre*, 6 Taunt. 289 (1815), and *Ward v. Johnson*, 6 Munf. (Va.) 6 (1817), the joint creditor who received a covenant that he should not be sued was a principal debtor, and there also it was held that the other joint obligors were not discharged. The question of suretyship was referred to only in

The doctrine protecting sureties, however, is held applicable to cases where one joint debtor is merely a surety for the whole debt. Though in early cases the parol evidence rule was thought to prevent the proof of such a relation between the parties unless stated in the instrument creating the obligation, at first in equity and now generally at law, if the creditor at the time when he received the obligation knew that one of the joint debtors was as between himself and his co-obligors primarily liable for the whole debt, the creditor will lose his rights against all the joint obligors if he makes any agreement or commits any action with reference to the debtor primarily liable which would impair the rights or increase the risk of those who were sureties.⁵¹

A more difficult question arises where the creditor did not know when he received the joint obligation that the obligors bore the relation of principal and surety to each other, and, subsequently, but before covenanting with the principal debtor, received this information. In some decisions it has been held an infringement of the rights for which the creditor bargained to compel him to recognize the relation between the debtors; and under these de-

the case last cited, in which it was suggested that in equity the surety might be entitled to discharge. Such would now be the surety's recognized right both at law and in equity.

⁵¹ *Scott v. Scruggs*, 60 Fed. 721 (1894); *Branch Bank, etc. v. James*, 9 Ala. 949 (1846); *Lehnert v. Lewey*, 142 Ala. 149, 37 So. 921 (1904); *Vestal v. Knight*, 54 Ark. 97, 15 S. W. 17 (1891); *Drescher v. Fulham*, 11 Colo. App. 62, 52 Pac. 685 (1898); *Stewart v. Parker*, 55 Ga. 656 (1876); *Trustees of Schools v. Southard*, 31 Ill. App. 359 (1889); *Sample v. Cochran*, 84 Ind. 594 (1882); *Lambert v. Shitler*, 62 Ia. 72, 17 N. W. 187 (1883); s. c. 71 Ia. 463, 32 N. W. 424 (1887); *Roberson v. Blevins*, 57 Kan. 50, 45 Pac. 63 (1896); *Neel v. Harding*, 2 Met. (Ky.) 247 (1859); *Jones v. Fleming*, 15 La. Ann. 522 (1860); *Cummings v. Little*, 45 Me. 183 (1858); *Guild v. Butler*, 122 Mass. 498 (1877); *Barron v. Cady*, 40 Mich. 259 (1879); *Smith v. Clop-ton*, 48 Miss. 66 (1873); *O'Howell v. Kirk*, 41 Mo. App. 523 (1890); *Lee v. Brugg-mann*, 37 Neb. 232, 55 N. W. 1053 (1893); *Rochester Savings Bank v. Chick*, 64 N. H. 410, 13 Atl. 872 (1887); *Hubbard v. Gurney*, 64 N. Y. 457 (1876); *Welfare v. Thompson*, 83 N. C. 276 (1880); *McComb v. Kittridge*, 14 Oh. 348 (1846); *Diffen-bacher's Estate*, 31 Pa. Super. Ct. 35 (1906); *Turrill v. Boynton*, 23 Vt. 142 (1851); *Glenn v. Morgan*, 23 W. Va. 467 (1884); *Moulton v. Posten*, 52 Wis. 169, 8 N. W. 621 (1881). But the law of California is otherwise. The creditor may treat a joint obligor as a principal debtor though knowing him to be a surety. *California, etc. Bank v. Ginty*, 108 Cal. 148, 41 Pac. 38 (1895). And see *Moriarty v. Bagnetto*, 110 La. 598, 34 So. 701 (1903). In *Yates v. Donaldson*, 5 Md. 389 (1854), and in *Anthony v. Fritts*, 45 N. J. L. 1 (1883), the defense was held inadmissible at law, although it was suggested that equity would give relief. See *Brandt, Suretyship*, § 38. See further Professor Crawford D. Hening, in 59 Univ. Pa. L. Rev. 532.

cisions he still may treat each debtor as if he were liable as a principal for an *aliquot* part of the whole debt.⁵² But by the great weight of authority, even in the situation supposed, the creditor is required to recognize the equitable rights of the surety and therefore loses his own right against all the debtors if after learning of the relation of the obligors to each other he makes such an agreement or so acts with reference to a joint debtor who is, in fact, the principal obligor, as to impair the rights of a co-debtor who is a surety.⁵³

The principles of suretyship under consideration depend merely on the existence of the relation of principal debtor and surety between persons liable for the same debt. Whether they are liable jointly, jointly or severally, or merely severally, is not material. It is, therefore, pertinent to consider in this connection authorities relating to principal and surety bound severally; and it may be added, therefore, that in the situation supposed the English courts and the Supreme Court of the United States have held that knowledge acquired by the creditor at any time prior to the indulgence given to the principal, excuses the surety.⁵⁴

It seems very possible, however, that the Uniform Negotiable Instruments Act, which now has been passed in most of the United

⁵² *Drescher v. Fulham*, 11 Colo. App. 62, 52 Pac. 685 (1898); *Gano v. Heath*, 36 Mich. 441 (1877); *Heath v. Derry Bank*, 44 N. H. 174 (1862); *Diffenbacher's Estate*, 31 Pa. Super. Ct. 35 (1906). See also *Hoge v. Lansing*, 35 N. Y. 136 (1866); *Delaware County Trust Co. v. Haser*, 199 Pa. St. 17, 48 Atl. 694 (1901); *Farmers, etc. Bank v. Rathbone*, 26 Vt. 19 (1853).

⁵³ *Scott v. Scruggs*, 60 Fed. 721 (C. C. A.) (1894); *Branch Bank v. James*, 9 Ala. 949 (1846); *Stewart v. Parker*, 55 Ga. 656 (1876); *Lauman v. Nichols*, 15 Ia. 161 (1863); *Neel v. Harding*, 2 Met. (Ky.) 247 (1859); *Fuller v. Quesnel*, 63 Minn. 302, 65 N. W. 634 (1895); *Smith v. Clopton*, 48 Miss. 66 (1873); *O'Howell v. Kirk*, 41 Mo. App. 523 (1890); *Parsons v. Harrold*, 46 W. Va. 122, 32 S. E. 1002 (1899). See also *Ewin v. Lancaster*, 6 B. & S. 571 (1865); *Wheat v. Kendall*, 6 N. H. 504 (1834); *Westervelt v. Frech*, 33 N. J. Eq. 451 (1881); *Shelton v. Hurd*, 7 R. I. 403 (1863); *Zapalac v. Zapp*, 22 Tex. Civ. App. 375, 54 S. W. 938 (1900).

⁵⁴ *Union Mutual Life Ins. Co. v. Hanford*, 143 U. S. 187, 191, 12 Sup. Ct. 437 (1892). Mr. Justice Gray said: "The rule applies whenever the creditor gives time to the principal, knowing of the relation of principal and surety, although he did not know of that relation at the time of the original contract; *Ewin v. Lancaster*, 6 B. & S. 571; *Oriental Financial Corporation v. Overend*, L. R. 7 Ch. 142, and L. R. 7 H. L. 348; *Wheat v. Kendall*, 6 N. H. 504; *Guild v. Butler*, 127 Mass. 386; or even if that relation has been created since that time. *Oakeley v. Pasheller*, 4 Cl. & Fin. 207, 233; s. c. 10 Bligh n. s. 548, 590; *Colgrove v. Tallman*, 67 N. Y. 95; *Smith v. Sheldon*, 35 Mich. 42." Quoted with approval in *Scott v. Scruggs*, 60 Fed. 721, 725 (C. C. A.) (1894).

States, reverses, so far as negotiable instruments are concerned, the rule of suretyship generally established, and permits a creditor to covenant not to sue or to forbear proceeding against one of several persons jointly liable on the instrument, though the covenantee is the principal debtor and known to be such, and the creditor's rights against the surety are not in terms reserved.⁵⁵

Whether consideration received from one joint debtor must be credited in proceedings against another.

If it be assumed that an agreement made by a creditor with a joint, or a joint and several debtor, does not discharge the remaining debtors, either on the technical principles of the common law governing joint debtors, or on the principles of suretyship, it may still be asked are these remaining debtors entitled to credit for the consideration paid by the debtor who received a covenant or qualified release, or are they liable for the whole debt without deduction? The answer to this question seems to depend on the terms of the agreement made by the creditor. If A. and B. are jointly liable to C. for \$100, C. may covenant not to sue A. in consideration of the payment of \$25 on the debt, or in consideration of the payment of a separate and additional sum of \$25; just as a creditor may agree to forbear suing an individual debtor in consideration of the payment of part of the debt or in consideration of an additional sum.⁵⁶ But in the absence of clear evidence of a contrary intention, where a creditor covenants not simply for temporary forbearance, but permanently never to sue one of several debtors, it should be presumed that the payment made by that debtor in consideration for the covenant is a payment on account of the debt, and therefore to that extent the debt is discharged as to all the debtors.⁵⁷

⁵⁵ This was so held in *Vanderford v. Farmers' Bank*, 105 Md. 164, 66 Atl. 47 (1907); *Bradley Engineering Co. v. Heyburn*, 56 Wash. 628, 106 Pac. 170 (1910); *Cellers v. Meachem*, 49 Or. 186, 89 Pac. 426 (1907); *Wolstenholme v. Smith*, 34 Utah 300, 97 Pac. 329 (1908); *Richards v. Market Exch. Bank Co.*, 81 Oh. St. 348, 90 N. E. 1000 (1910). But see *contra*, *Fullerton Lumber Co. v. Snouffer*, 139 Ia. 176, 117 N. W. 50 (1908); *Farmers' Bank v. Wickliffe*, 134 Ky. 627, 121 S. W. 498 (1909); *Fritts v. Kirchdorfer*, 136 Ky. 643, 124 S. W. 882 (1910). See the discussion of this matter by Professor Crawford D. Hening in 59 Univ. Pa. L. Rev. 532.

⁵⁶ See Langdell, *Summary of Contracts*, § 54, p. 70.

⁵⁷ See *Carroll v. Corbitt*, 57 Ala. 579 (1877). This is expressly so provided in many of the statutes referred to below.

Rights of a joint debtor who has received a covenant that he shall not be sued, or a qualified release.

The effect of a covenant not to sue one of several joint debtors or of a release of one with a reservation of rights against the others has been considered from the aspect of the creditor. The same question may be considered from the aspect of the debtor who has received the covenant or release; and it may be premised that if the undischarged joint debtors are forced by any means without their consent to pay more than their share of the joint debt, they can in turn enforce a claim for contribution against the debtor or debtors who received the covenant or qualified release.⁵⁸ What then are the rights of a joint debtor discharged by the creditor, but thus forced to contribute by a co-debtor? The answer would seem to depend upon the construction of the covenant or release which he has received from his creditor. It seems possible for a creditor to covenant with a joint debtor that not only shall the covenantee be free from direct liability to the creditor, but also that he shall not be made indirectly liable by being forced to contribute on account of payments made by the other joint debtors. If such is the true meaning of a creditor's covenant, the covenantee when forced to contribute by the other debtors would have an action at law against the covenantor to recover the amount of his contribution, and in order to avoid circuity of action the covenantee would be entitled to relief in equity as well as at law for the substantial enforcement of the covenant:

"The intention of the parties is carried out by allowing the creditor to take payment [judgment?] at law, leaving the party who holds the covenant to his remedy in equity for a specific performance, by which he is fully protected, not only from paying more directly, but if *there be sureties*, by restraining the creditor from collecting any amount out of them, because that would subject him [the covenantee] to their action, and thus indirectly violate the covenant, or if there be other principal obligors, by restraining the collection of any more than an *aliquot* part of the debt, or any amount that would subject the party [covenantee] to an action for contribution."⁵⁹

⁵⁸ Hutton v. Eyre, 6 Taunt. 289 (1815); Price v. Barker, 4 E. & B. 760, 780 (1855).

⁵⁹ Russell v. Adderton, 64 N. C. 417 (1870). Quoted with approval in Craven v. Freeman, 82 N. C. 361, 365 (1880). See also Kirby v. Taylor, 6 Johns. Ch. (N. Y.) 242, 253 (1822), where Chancellor Kent construed a covenant not to sue one joint

But this is not the necessary construction of a covenant not to sue. It is questionable whether such a covenant can be extended by implication to mean that the covenantee shall not be sued by anyone on account of the debt.⁶⁰ Certainly, if the creditor by his covenant or release expressly reserves his right against the other joint debtors, the agreement must then necessarily be construed as binding the creditor to refrain only from direct proceedings against the debtor who receives the covenant or release, but not to hold that debtor harmless from such liability as may come to him indirectly after the debt has been enforced against other joint debtors. As has been seen, even though the debtor receiving the covenant or release is known to be the principal debtor, a right may be reserved against the other joint debtors though known to be merely sureties.⁶¹ And the enforcement by the sureties of their right to indemnification against their principal will give the latter no right against the creditor,

"for, when the right is reserved, the principal debtor cannot say it is inconsistent with giving him time that the creditor should be at liberty to proceed against the sureties, and that they should turn round upon the principal debtor, notwithstanding the time so given him; for, he was a party to the agreement by which that right was reserved to the creditor and the question whether or not the surety is informed of the arrangement is wholly immaterial."⁶²

But even where the creditor expressly reserves a right against other co-debtors than the one released, and therefore may in a circuitous manner compel the one released to pay a portion of the debt, by rendering him liable to a suit for contribution, or indemnity, it seems the creditor would be liable for breach of covenant if

obligor as amounting in effect to an agreement to discharge that obligor and also to discharge a surety from liability for his debt.

⁶⁰ The implication was held not permissible in *Mallet v. Thompson*, 5 Esp. 178 (1804); and this conclusion seems necessarily involved in any unqualified statement that a covenant not to sue one joint debtor does not discharge the others, for if such a covenant were construed as meaning that the covenantee should be sued by no one, to avoid circuity of action the covenantor in some cases at least ought not to be allowed to sue the others. See *supra*, p. 215, n. 50.

⁶¹ *Bateson v. Gosling*, L. R. 7 C. P. 9 (1871). And see cases cited *supra*, p. 212, n. 38.

⁶² *Bateson v. Gosling*, L. R. 7 C. P. 9, 15 (1871). To the same effect are *Nevill's Case*, L. R. 6 Ch. 43, 47 (1870); *Parmelee v. Lawrence*, 44 Ill. 405, 411 (1867).

he himself should levy execution directly on the debtor to whom he had given a release.⁶³

Statutes.

The principles which have been set forth above, as established by the common law, still remain unaltered by statute in the majority of the states. In a number of states, however, it has been provided that a creditor may release or make a compromise with one joint debtor without discharging others.⁶⁴ The effect of such statutes seems to be to make a release of a joint debtor, in substance equivalent to a covenant not to sue or to a release with reservation of rights at common law. The most important question under such statutes is how far the rights of sureties are affected. In many of the statutes it is expressly provided that the right of contribution against other joint debtors shall not be affected. In some statutes it is expressly provided that when a joint debtor released is a principal debtor, or when a debtor not released is a mere surety, the statute is inapplicable.⁶⁵ Under such statutes the rule that a surety is discharged by the discharge of the principal debtor, without the surety's consent and without reservation of rights, apparently remains in force.⁶⁶

⁶³ In *Solly v. Forbes*, 2 B. & B. 38 (1820), the action was brought against joint debtors Forbes and Ellerman; the latter had been given by the creditors a release with a proviso reserving all rights against Forbes. The counsel for the defendant urged that this release discharged the claim altogether, but the counsel for the plaintiff argued (at page 45): "The present suit is quite consistent with the provisoes, for Ellerman is sued jointly with Forbes on a joint debt; Ellerman is only joined for conformity, and if he or his property be taken in execution, he has his remedy by an action for damages on this deed, taking it as a covenant not to sue." To this part of the argument the Court in its opinion said: "It is not necessary now to say anything as to any ulterior remedy the defendant may have or suppose himself to have:— In this respect he will act as he may be advised, and as circumstances may seem to require."

⁶⁴ Cal. Civ. Code (1906), § 1543; Colo. Rev. Stat. (1908), §§ 3605, 3606; Conn. Gen. Stat. (1902), § 655; Minn. Rev. Laws (1905), § 4283; Mo. Rev. Stat. (1909), § 2777; Mont. Rev. Code (1907), §§ 7135, 7136; Nev. Comp. Laws (1900), §§ 2739, 2741; N. Y. Debtor & Creditor Law, § 230, Birdseye's Cumming & Gilbert's Consol. Laws (1909); Ohio Gen. Code (1910), §§ 8079-8084; R. I. Gen. Laws (1909) (like Ohio); S. C. Civ. Code (1902), §§ 2841-2843; Utah Comp. Laws (1907), §§ 2037, 2038; Vt. Pub. Stat. (1906), §§ 1528, 1529; Va. Code (1904), §§ 2856, 2857; Wis. Stat. (1898), §§ 4204, 4205.

⁶⁵ See statutes cited *supra* of California, Minnesota, Utah, Vermont, Wisconsin.

⁶⁶ See *Harrier v. Bassford*, 145 Cal. 529, 538 (1904).

The same construction would doubtless be adopted in the absence of express provisions in the other states under consideration.⁶⁷

In the statutes of a few states the suretyship relation between joint debtors, each of whom is primarily liable for a share of the debt, is recognized; and acceptance of the consequences of the relation is indicated by provisions that a release of one joint debtor entitles the others to credit on the debt of the full portion which the released debtor was previously bound to pay.⁶⁸

In a few of these states, however, the mistake seems to have been made of assuming that when joint debtors are each primarily bound to pay a share of the debt, they are necessarily bound each to pay an equal share, for it is provided that a release of a joint debtor entitles the others to credit on the debt of an equal share thereof according to the number of debtors.⁶⁹ It is obvious that the credit should be for the amount for which the debtor released was primarily liable, whether that was a ratable portion or not, unless a larger sum had in fact been paid by the debtor released. In the latter event the credit should be for the full amount paid.

In Utah and Wisconsin it is provided that the statutory permission to release one joint debtor shall not be so applied as to permit a principal to be released without the discharge of sureties.⁷⁰ This provision perhaps has the effect of making it impossible for a creditor to release a joint debtor who is a principal and still preserve even by express reservation his rights against sureties.

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⁶⁷ *State v. Matson*, 44 Mo. 305, 308 (1869); *Lower v. Buchanan Bank*, 78 Mo. 67, 69 (1883).

⁶⁸ See statutes cited *supra* of Colorado, Minnesota, Montana, Nevada, Vermont and Virginia. So it was held in *Lower v. Buchanan Bank*, 78 Mo. 67, 69 (1883), and in *Morgan v. Smith*, 70 N. Y. 537 (1877), that the common-law rule that the release of one jointly bound surety discharges his co-sureties was abrogated by the state statute; but that unreleased co-sureties were thereafter liable only for the balance remaining after deducting the discharged surety's share.

⁶⁹ See statutes cited *supra* of Minnesota, Nevada and Vermont.

⁷⁰ See statutes cited *supra* of Utah and Wisconsin.

LEGAL CAUSE IN ACTIONS OF TORT.

[Continued.]

WE now proceed to consider the intrinsic correctness of the alleged rule of non-liability for improbable consequences. The alleged rule, stated in a negative form, is: that a wrongdoer is not liable for improbable consequences. Or, stated in an affirmative form, it is: that a wrongdoer is liable for probable consequences only; for the reason that only such consequences can be deemed to have been "caused," in the legal sense, by his tort.

The alleged rule, in effect, states two requisites, both of which must be made out in order to establish in law a causal relation between defendant's tort and plaintiff's damage; namely:

A (1). The damage to plaintiff must be an actual consequence of defendant's tortious act.

A (2). This consequence (the happening of the damage) must have been reasonably foreseeable at the time of committing the tort (at the time of doing the tortious act).¹

Or, to express the requisites in other words,

B (1). Defendant's tortious conduct must have been in fact a cause of plaintiff's damage.

B (2). That the tort would be likely to cause the result must have been reasonably foreseeable at the time of commission.²

What interpretation is to be put upon the words "an actual consequence" in A (1); or upon the words "in fact a cause" in B (1)?

Either, the meaning is—What would have been regarded as the "actual consequence or cause" in the eye of the law, and for

¹ See Terry, *Leading Principles of Anglo-American Law*, §§ 551, 110.

² This view, whether intrinsically correct or not, is very distinctly brought out by Mr. Bower: "To prove that the damage resulted from the slander in fact . . . is to prove nothing. The causal connection must be established in the first place, but it must also be shown that the cause is a '*vera causa*' in the philosophical sense, that is, something which, in the ordinary course of events, would be expected to produce a result of the kind proved. . . . The following are cases where the damage, though resulting in fact from the slander, was held not to be the natural or probable consequence thereof, so as to constitute a cause of action; . . ." Bower, *Code of the Law of Actionable Defamation*, 34, note r.

which a defendant would have been held liable, if it were not for the additional legal requirement that a consequence must have been legally foreseeable.

Or, the meaning is — What would have been deemed the “actual consequence or cause” by a reasonable man, deciding the question as purely a question of fact, and using those terms in their ordinary signification without regard to legal definitions or requirements.

(These phrases are often used in the latter sense in this discussion.)

Under either of the above interpretations of the alleged rule, a defendant will escape liability for an actual consequence of his tort (for a result of which his tort was in fact the cause) unless such result was reasonably foreseeable (probable). It is not enough that the damage was an actual consequence. It must also have been a probable consequence. Otherwise it is not regarded as having been “caused” by the tort.³

So far as to the interpretation of the alleged rule.

Now, as to its application. For what purposes, or with what effect, is it to be applied?

Either (1), the alleged rule is to be applied as an arbitrary rule; exempting tortfeasors from liability, upon the ground of expediency, in cases where defendant's tort was in fact the actual cause of the damage;

³ But it may be asked — Is it not begging the question to assume that an improbable consequence can ever be an actual consequence, or that a tort can ever be in fact the cause of a consequence which was not probable? How can you so assume until you have first definitely settled what constitutes the legal test of the existence of causal relation; the very point in issue in the present discussion?

An obvious and sufficient answer is that the alleged rule itself so assumes. Else the word “improbable,” instead of being prefixed to “consequence,” should be rejected as surplusage.

Moreover, there are additional considerations bearing upon the above inquiry. We have already stated several other rules; each of which purports to furnish the exclusive legal test of the existence of causal relation; and each of which has some support from authority. These rules may be said to be in competition with the alleged rule of non-recovery for improbable consequences. Now, under the application of any one of these rival rules, it would not unfrequently be decided that a consequence which was not reasonably foreseeable was nevertheless an actual consequence, and that defendant's tort was in fact the cause of the improbable result.

Again: Suppose that we discard all legal tests, and deem the question of causative relation to be purely one of fact; an issue to be decided by the triers of fact unhampered by artificial rules or arbitrary legal definitions. Under such circumstances it would repeatedly be found that an improbable consequence was an actual consequence; that a tortious act was in fact the cause of a result which was not probable.

Or (2), its sole office is to furnish an exclusive and professedly infallible legal test whereby to solve the question of fact what is the actual consequence, what is in reality the cause.

As to the first application, there is certainly no *a priori* presumption in favor of the justice of such a rule. *Primâ facie*, it would seem that, in the case of unlawful acts, "he who wilfully, negligently, or otherwise, breaks the law . . . should be responsible for all damage which he actually causes thereby to other persons."⁴ On the primary question whether a defendant's conduct should be deemed wrongful (in a certain sense "unlawful"), it is often reasonable "that his conduct should be judged of by the probability of its causing injury to others."

"But when he stands as a proved wrongdoer and it is sought to make him responsible for the consequences to others of his wrong, what principle of justice or reason requires us to ask whether he foresaw or could have foreseen those precise consequences or not?"⁵

On the question of expediency we take issue with the supporters of the rule. We believe that more injustice than justice would result from such an application. The arguments *pro* and *con* will be more fully considered later in connection with the subject of causation in cases of negligent torts, where the subject has been more discussed than in any other connection, and where it has been claimed that there are special reasons for establishing a rule favorable to defendants.

As to the second application: Viewed superficially, it may seem widely different from the first application. It does not profess to be a limitation, on the grounds of expediency, of a wrongdoer's liability for damages which were actually caused by his tort. It professes to be simply a legal test to determine whether the damages were in fact caused by defendant's tort; whether a causal relation between defendant's tort and plaintiff's damage actually existed. But in reality the second application is an attempt, by an indirect method and with the aid of legal fiction, to bring about the same result that would follow directly from the first application. What difference does it make to the plaintiff whether his claim is disallowed

⁴ Mr. Salmond's conclusion, that the law "is not so," would appear to be adopted in deference to the supposed weight of authority and not upon principle. See Salmond, *Torts*, 2 ed., 105; Salmond, *Jurisprudence*, ed. 1902, 477-479.

⁵ See Terry, *Leading Principles of Anglo-American Law*, § 551.

upon the ground that it is inexpedient to allow recovery for an actual consequence if the happening of that consequence were improbable, or whether it is disallowed upon the ground that the law conclusively presumes that an improbable consequence was not an actual consequence of defendant's tort?

If it is asserted that the law invariably presumes (1) that an improbable result is not an actual result, or (2) that an improbable result is not caused by defendant's tort, or (3) that "actual result" and "probable result" are always equivalent terms; the answer is that the law would thus presume what frequently is not true in fact. The arbitrary test here proposed does not furnish a rational method of solving the issue of fact.

The probability that some harm will ensue may sometimes be a legal test of the tortiousness of defendant's conduct. But if it be once established that his conduct was tortious, and throughout this discussion we are proceeding upon the supposition that this has been established, then we submit that the probability or improbability of a result does not furnish a *legal* test of the existence of causative relation between defendant's tort and plaintiff's damage. Upon the question of fact whether the alleged damage actually occurred, or upon the question of fact whether defendant's tort actually caused such damage, probability may be a circumstance to be weighed by the jury in passing upon these questions of fact, a consideration to which they may give such probative weight as they think proper. But such probability does not constitute a legal test entitled to conclusive effect. (This subject and the confusion due to different meanings of the word "probability" will hereafter be considered more in detail.)

In brief, the question is whether defendant's act caused a particular result. That question is not to be conclusively decided by applying the test whether the effect which actually resulted was probable. The causative effect of defendant's tortious conduct is not increased by the fact that a particular result was foreseeable.⁶ The question as to the causative effect of a particular act is entirely distinct from the question as to the tortious nature of the same act.

⁶ "Probability is not an attribute of events in themselves but of our expectations of them. It is subjective, not objective. It is a name for somebody's guess whether they will happen." See Terry, *Leading Principles of Anglo-American Law*, § 547.

To avoid the possibility of misunderstanding, let us restate our general assumption, and the specific questions which are to be considered:

Assume that the defendant has committed a tort as against the plaintiff.

Assume also that the plaintiff has suffered damage of a kind which the law will notice and will afford redress for.

Then the problem is, whether the courts will treat the defendant's wrongful act as the cause, in the legal sense, of the damage to the plaintiff, and will hold the defendant liable for such damage.

This general problem raises two questions.

(1) Is defendant's tort in fact the cause of plaintiff's damage?

(2) If so, should the court establish an arbitrary rule of law, absolving (exonerating, exempting) defendant from liability for all, or any part of, the damage of which his tortious act is in fact the cause?

The first question is one of fact. If it is answered in the negative, there is an end of the case.

The second question is one of public policy or expediency.

It is assumed for the present that, as to the decision of the first question, the tribunal passing upon the matter of fact should not be hampered or influenced by any so-called rules of law, either *primâ facie* or rigid; or by any considerations of public policy. The first question, whether the damage was in reality caused by the defendant's tort, should be decided without reference to the second question, when, if at all, shall the law deem it expedient to exonerate a tortfeasor from liability for effects which were in reality caused by his tort.

In order to test the practical working of the alleged rule of non-liability for improbable consequences, and in order to consider what, if any, exceptions must be admitted if the general doctrine of the rule is to be adopted, it is desirable to consider separately its application to various distinct situations.

To begin: we adopt the view of Judge Townes, that the consequences of conduct should be divided into two classes — "those intended to be produced by the person whose conduct is under investigation, and those not intended by him."⁷

⁷ Townes, Torts, 150.

First. As to intended consequences; using "intended" in the sense of "desired"; but not in the sense of "foreseen" or "expected."⁸

A defendant does a tortious act, desiring that it may result in causing certain specific damage to plaintiff; but the defendant believes that there is only a very slight possibility of such a result; and such would be the belief of an average man in defendant's situation. The desired but improbable result actually happens. The defendant claims that the rule of non-liability for improbable consequences covers the case; and that under this rule he is absolved from liability.⁹

To put a concrete illustration: Defendant, desiring to shoot plaintiff, aims a gun at plaintiff and fires. The chances are ninety-nine out of a hundred that the gun will not carry far enough to reach plaintiff, and defendant so understands. The gun, however, for a wonder, does on this occasion carry far enough, and the plaintiff is wounded. Can defendant escape on the plea that the hitting of the plaintiff was a consequence not to have been reasonably anticipated; a result which he himself and all sensible bystanders deemed highly improbable?

No court would exonerate him. All legal writers who have considered the question would hold him liable.

"Every man is responsible for damage which he intended to result and which did result from his wrongful act, however improbable it may have been."¹⁰

⁸ See 20 HARV. L. REV. 256, note 4.

⁹ A distinction must be drawn between consequences which are actually foreseen by the defendant as probable, and consequences which are desired by the defendant but which neither the defendant nor anybody else regards as probable. Although an average man might not foresee that certain specific damage was likely to result from defendant's tortious conduct, yet if the defendant himself believed that such a result was likely to follow, then, if it does follow, he cannot escape under the rule of non-liability for improbable consequences. "That which a man actually foresees is to him, at all events, natural and probable." Pollock, Torts, 8 ed., 32. And see Watson, Damages for Personal Injuries, § 143.

But this differs from the case stated in the text above. There, although the result is desired by the defendant, yet it is not foreseen by the defendant or by anyone else, as likely to follow.

¹⁰ Salmond, Torts, 106. And see 1 Jaggard, Torts, 75; Bower, Code of the Law of Actionable Defamation, 34.

"If a result is intended, the doer will answer for it however remote it is, and however little natural or probable."¹¹

"But even where the damage is such as a person possessed of all the defendant's knowledge of the surrounding circumstances could not have reasonably anticipated as likely to flow from the wrongful act, the defendant will nevertheless be liable if he intended the result which in fact happened."¹²

"It does not lie in a man's mouth to say that the consequence which he deliberately planned and procured is too remote for the law to treat as a consequence."¹³

This doctrine, about which there is no doubt, is entirely inconsistent with the alleged sweeping rule of non-liability for improbable consequences. That rule could, of course, be amended in such a way that it would not cover this case of an improbable but desired consequence. As the rule is usually stated, however, liability for such a consequence constitutes an exception to the rule.

Unsuccessful attempts have been made to reconcile these two incongruous doctrines. In Clerk & Lindsell on Torts¹⁴ it is said: "Intention will supply the necessary link to make that consequence proximate which was *primâ facie* remote." Mr. Street, who by the way does not endorse the alleged rule of non-liability for improbable consequences, says:

"... the mental attitude of the wrongdoer is of capital importance in determining whether a given element of damage is proximate or remote. . . . The factor of malice (in the sense of intending particular harm) is thus often important in determining whether damage can be treated as a proximate result of a given wrongful act."¹⁵

And it has been said that "in cases of wilful or malicious wrong the rule of remoteness is 'relaxed.'"

But this reasoning is unsatisfactory. The defendant's specific intent or desire does not add anything to the causative effect of the defendant's conduct. The effect of defendant's tortious con-

¹¹ Salmond, Jurisprudence, ed. 1902, 479.

¹² Clerk & Lindsell, Torts, 5 ed., 147.

¹³ Pollock, Torts, 8 ed., 331.

¹⁴ 5 ed., 147.

¹⁵ I Street, Foundations of Legal Liability, 489. In the omitted portion, the learned author seems to have in mind the case of one who actually foresees particular damage as an ultimate result; and he may have intended the above-quoted passage to refer to such an actor.

duct is not thereby made more appreciably continuous down to the time of damage. Defendant's conduct is not thereby made a more substantial factor in subjecting plaintiff to damage; nor is it thereby made any more potentially operative for harm at the time when the damage itself was inflicted. "The character of the wrong or condition of mind of the defendant" may sometimes furnish ground for allowing exemplary damages, but do not bear upon the wrongdoer's responsibility for actual consequences of his proved or admitted tort. They do not create a liability for actual damage if that liability would not otherwise have existed.¹⁶

Now as to the unintended consequences.

The question as to liability for such consequences may arise:

1. In torts other than negligent torts.
2. In negligent torts.

Consider first, as to unintended consequences in torts other than negligent torts.

What we now desire to call particular attention to is the fact that, in many jurisdictions, the alleged rule, when sought to be applied to cases falling under this special division, would be held to be subject to important exceptions; and that the allowance of some of these exceptions seems inconsistent with the view that the alleged rule itself is intrinsically correct.

What are these "exceptions"? In what classes of cases falling under this particular head do courts fail to apply the alleged rule of non-liability for improbable consequences?

We begin by calling attention to two important sets of cases, sometimes put under one general head; but perhaps better stated as separate classes.

Class 1. Courts frequently hold a wrongdoer liable for an improbable consequence in cases where defendant's conduct was not only tortious but criminal, where defendant's conduct was "illegal" in the sense of being criminal, especially if the crime were of some

¹⁶ See A. G. Sedgwick, *Elements of the Law of Damages*, 2 ed., 56; Elliott, C. J., in *Indianapolis, etc. R. Co. v. Pitzer*, 109 Ind. 179, 189, 6 N. E. 310, 315, 10 N. E. 70 (1886).

magnitude.¹⁷ This doctrine is sometimes stated as if confined to crimes which are *mala in se*, but we do not think that it is so limited.

A good illustration of this judicial tendency, which prevails in criminal cases as well as civil, is furnished by the case of *Queen v. Saunders*,¹⁸ where Saunders was held liable for an improbable result, and one which he did not desire. The case is thus summarized by Mr. Bishop¹⁹: If one "gives poison to a person whom he means to kill, but who innocently passes it to another not meant, yet who takes it and dies":— the party originally giving the poison and unintentionally causing the death, "is guilty, the same as if he had meant it, of the felonious homicide."²⁰ A similar result would be reached to-day in a civil action under a death statute founded on the same state of facts; *i. e.* action under statute giving civil remedy to administrator or relatives of a deceased person for death caused by the tort of the defendant.

Some of the reasons given for this class of decisions are erroneous. It has been said that defendant is liable because "the law conclusively presumes that all the consequences were foreseen and intended."²¹ So there is occasional talk about "constructive intent"; or about transposing or transferring the intent to the unintended result. These fictions should be discarded. They serve only to conceal the fact that courts refuse in such cases to apply the alleged rule of non-liability for improbable consequences.

Class 2. Courts frequently hold a wrongdoer liable for improbable consequences in cases where his act was intentional and was consciously wrong; even though the act was not criminal, and though the specific result which followed was not intended.²²

¹⁷ See Sedgwick, *Damages*, 6 ed., 89, 99, 129; Terry, *Leading Principles of Anglo-American Law*, §§ 537, 551. Cf. 1 Bishop, *New Criminal Law*, §§ 226, 760, 762, paragraph 4.

¹⁸ 2 Plowd. 473 (1574).

¹⁹ 1 Bishop, *New Criminal Law*, § 328.

²⁰ The court did not base their decision upon the failure of Saunders to take the poisoned apple away from his daughter, but upon his giving it to his wife with intent to poison the wife.

²¹ See 16 Am. & Eng. Encyc., 1 ed., 434.

²² It is sometimes said that the wrongdoer is held liable when his conduct is "wilful and malicious," but we prefer the phraseology used in the text.

Here we have another "exception" to the alleged general rule that a tortfeasor is not liable for improbable consequences. *Wyant v. Crouse*²³ is an example of this class of cases. This was an action on the case for the destruction of plaintiff's blacksmith shop by fire. Defendant wrongfully broke into the shop and started a fire in the forge. He was not negligent in managing the fire, nor in looking after it and in using proper precautions to prevent it from doing damage. After he left the shop, a result occurred which was not to have been anticipated as likely to happen. The building in some unexplained way became ignited from the fire in the forge and was consumed. The court said: ". . . the defendant intended no such injury nor did he any act which can be said to have given reason for expecting the consequences. It was a fortuitous consequence of his act, entirely unforeseen." Nevertheless he was held liable for the burning of the shop. The court said: "He was engaged in an unlawful act, and therefore was liable for all the consequences, indirect and consequential as well as direct, . . ."

No one can fail to see that the results frequently reached in the two sets of cases just stated under Class 1 and Class 2²⁴ are entirely inconsistent with the existence of a general rule of non-liability for improbable consequences. Mr. Street combines the results in both classes under the following statement:

" . . . we find this to be true, that as the wrongful act which is alleged to have caused the damage increases in moral obliquity or in

²³ 127 Mich. 158, 86 N. W. 527 (1901).

²⁴ As to (1) and (2) we have said that courts "frequently hold." They do not always so hold, nor are jurists unanimously agreed as to whether they should so hold. But the tendency seems in favor of such holding.

Lord Bacon, in his comments upon the maxim generally cited under his name, says:

"This rule faileth in covinous acts, which, though they be conveyed through many degrees and reaches, yet the law taketh heed to the corrupt beginning, and counteth all as one entire act. . . ."

" . . . In like manner this rule holdeth not in criminal acts, except they have a full interruption; because when the intention is matter of substance and that which the law doth principally behold, there the first motive will be principally regarded, and not the last impulsion." Bacon's Works, Eng. ed. 1879, Vol. 7, 328, 329.

For authorities and various expressions of opinion, cf. 1 Jaggard, Torts, 372, 382; 1 Sedgwick, Damages, 6 ed., 89, 99, 129; 1 Sutherland, Damages, 3 ed., §§ 43, 44; Pollock, Torts, 8 ed., 49-51; 36 Am. St. Rep., note 819, 820; Terry, Leading Principles of Anglo-American Law, §§ 547, 557.

illegality, the legal eye reaches further and will declare damage to be proximate which in other connections would be considered to be remote." Or in other words "legal causation reaches further" in some kinds of torts than in other kinds.²⁵

If the alleged rule of non-liability for improbable consequences is intrinsically correct, why allow the inconsistent and exceptional doctrines which frequently prevail in Class 1 and Class 2? Is the causative effect of defendant's conduct increased by its criminality, or by its enormity, or by its objectionable moral quality? To these latter questions there can be but one answer. The defendant's conduct in such cases is no more a cause, either in logic or in fact, of plaintiff's damage than his conduct is a cause in the case of an ordinary tort not involving these specially objectionable features.

Is not the following explanation correct?

The so-called exceptional doctrines in Class 1 and Class 2 are recognized by the courts, not because there are special reasons why the alleged general rule is inapplicable to these cases, but because the alleged general rule itself is intrinsically unjust, and its injustice is more readily apparent in these cases than in ordinary instances.

We find no fault with the doctrine often prevailing in Class 1 and Class 2. What we do complain of is, that this doctrine should be stated as an exception to an alleged general rule of non-liability for improbable consequences; instead of being regarded as a logical application of a general rule of causation which does not profess to exclude liability for improbable consequences. If the doctrine frequently prevailing in Class 1 and Class 2 is correct, does it not follow that the alleged general rule is wrong? And, on the other hand, if the alleged general rule is correct, what logical ground exists for the qualification, or denial, of it which obtains in Class 1 and Class 2?

If all these incongruous and inconsistent doctrines are to be upheld, the result would seem to justify Mr. Street's position — that "the line of demarcation between proximate and remote damage . . . is really a flexible line."²⁶

²⁵ 1 Street, Foundations of Legal Liability, III.

²⁶ 1 Street, Foundations of Legal Liability, III.

Besides Classes 1 and 2, just discussed, there are additional instances falling under the same general head of "torts other than negligent torts," where courts allow recovery for unintended and improbable consequences. As the "tort" in these instances is either based on an exceptional common-law doctrine, or upon a liability or duty created by statute, we do not lay so much stress upon them as upon Classes 1 and 2; but Class 3 and Class 4 deserve some consideration in this connection.

Class 3. Cases where the common law imposes upon a man absolute liability, irrespective of any actual fault on his part; cases of so-called "extra-hazardous user of property," or "acting at peril"; where an actor is practically made an insurer.

In some cases of this class, probability of the damaging result is not a requisite test of causal relation. Recovery is allowed for improbable consequences.²⁷ Take, for instance, the case of the keeper of an animal which the law considers dangerous to mankind, and hence kept at peril. In *Filburn v. People's Palace and Aquarium Co.*²⁸ the jury found specifically that the particular elephant in question was not an animal dangerous to man. This certainly seems to involve the finding that there was no reasonable cause to anticipate that the elephant would harm the plaintiff. Yet the keeper of the elephant was held liable, notwithstanding the improbability of the result which actually occurred.²⁹

²⁷ But see Salmond, *Torts*, 2 ed., 105, 107.

²⁸ 25 Q. B. D. 257 (1890).

²⁹ See Terry, *Leading Principles of Anglo-American Law*, §§ 547, 557.

There is another large class of cases where, in common-law actions, defendants are held liable for improbable consequences. But the result in many of these cases is reached upon a peculiar theory as to the defendant's position, and the cases are not discussed by the courts as if they specially concerned a question of causation. Hence it may be doubted whether they ought to be regarded as furnishing a distinct exception to the alleged rule of non-liability for improbable consequences.

The tort in these cases "consists in the unlawful assumption of dominion over another's property." See 36 Am. St. Rep. 821, note. Mr. Salmond says: "The rule as to remoteness of damage has no application to those cases in which a defendant has wrongfully taken possession of or otherwise dealt with property in such a manner that it is now at his risk. In such a case he is responsible for any resulting loss, destruction, or damage of that chattel, however remote that consequence may be." Salmond, *Torts*, 2 ed., 114. And see 1 Sedgwick, *Damages*, 9 ed., § 121 *a*.

In a very large proportion of these cases, the defendant's tort is what is technically called "conversion." While the plaintiff is nominally seeking to recover "damages" for the conversion, he is really compelling the defendant to purchase the chattel, pay-

Class 4. (a) Some cases where an action is expressly given, or a liability expressly imposed, by statute for conduct which, though involving fault on the part of the defendant, was not actionable at common law. Also (b) some cases where, though the statute does not in express terms give an action, yet the courts hold that breach of the statutory duty affords basis for an action of tort.³⁰

Of course the precise question in these cases is one of legislative intention; not what is the general common-law rule of legal cause; but what rule did the legislature intend should be applied to determine the question of the existence of causal relation under the particular statute.³¹ But the legislature, where there is nothing in the words or the subject-matter of the statute to indicate the contrary, is supposed to use legal terms in their common-law signification. Here we have statutes which, in expressly imposing liability for damage, use such terms as "caused by," "occasioned by," "arising from," "by means of," "happening by reason of," "in consequence of," and the like. And we find that under some of these statutes the courts allow recovery for consequences which were improbable. Such decisions would indicate judicial doubts, to say the least, as to the intrinsic correctness of the alleged common-law rule of non-liability for improbable consequences, or in other words the supposed common-law doctrine that probability is essential to the existence of causal relation. Indeed, it might seem that judges construe the term "caused," or its equivalent, when used in a statute, without feeling hampered by previous judicial definitions or *dicta* in common-law actions; and that they feel at liberty here to take a common-sense view, which their predecessors might well have adopted when the question first arose in common-law actions.

ing a price equal to its value at the date of conversion. See Salmond, *Torts*, 2 ed., 339. He has a right to elect to consider the chattel as the property of the defendant from the moment of the conversion; and hence at the risk of the defendant so far as concerns any harm happening to it, even though such harm was not probable.

³⁰ As illustrations of (a), see *Davis v. Standish*, 26 Hun (N. Y.) 608 (1882); *Eten v. Luyster*, 60 N. Y. 252 (1875); *Barker v. Western Union Tel. Co.*, 134 Wis. 147, 114 N. W. 439 (1908).

³¹ It is assumed to be competent for the legislature to enact that some rule of causation other than the common-law rule shall apply in actions under such statutes. See 1 *Sutherland, Damages*, 3 ed., § 16, p. 44; 1 *Sedgwick, Damages*, 9 ed., § 120 b.

There are also statutes which impose liability upon innocent persons, who are not wrongdoers even in theory or in legal fiction. Decisions under such statutes might seem irrelevant upon the question of the tests of causal relation in an action of tort. But these decisions, when analyzed, have some tendency to impair, if not to refute, an argument sometimes urged in favor of the alleged rule of non-liability for improbable consequences.

The British Workmen's Compensation Act of 1897³² imposes liability upon an employer to his workman, entirely irrespective of any fault on the part of the employer or of anybody else. He is made liable to compensate his workmen for "personal injury by accident arising out of and in the course of the employment." This statute "is a law of compulsory insurance and quite beyond the region of actionable wrongs."³³ It provides *inter alia* for compensation "when death results from the injury." The English and Scotch courts both hold that the term "results" includes improbable consequences.³⁴

In *Dunham v. Clare*, Collins, M. R., said:³⁵

"... the only question is whether death in fact resulted from the injury. If death in fact resulted from the injury, it is not relevant to say that death was not the natural or probable consequence thereof. The question whether death resulted from the injury resolves itself into an inquiry into the chain of causation."³⁶

These decisions under the Workmen's Compensation Act tend to negative a view, which perhaps no judge has ever explicitly stated as his *ratio decidendi* but which has in fact sometimes influenced judicial opinions. Courts, when holding in common-law actions that a tortfeasor is liable "only for probable consequences," have sometimes been influenced by the belief that there is no other practicable, "workable" test of the existence of causal relation.

³² 60 & 61 Vict. c. 37.

³³ Pollock, Torts, 6 ed., 105.

³⁴ *Dunham v. Clare*, [1902] 2 K. B. 292; *Malone v. Cayzer, Irvine & Co.*, Scotch Sess. Cas. (1908), 479; *Ystradowen Colliery Co. v. Griffiths*, [1909] 2 K. B. 533.

³⁵ At p. 296.

³⁶ It should be added that the learned judge intimated, in what we regard as a *dictum*, that the law would be otherwise in the case of a tortfeasor's liability at common law. In the latter case, he said that "the liability is measured by what are the reasonable and probable consequences of his breach of duty."

In their view, it is a case of "Hobson's choice"; the court must lay down this rule of causation, or have no test at all. Some decisions go far towards laying down a positive rule, that nothing can in law be deemed the result of an act, unless, at the time of doing the act, the happening of such a result could have been foreseen as a probable consequence. The judge, if pressed, might say that he means only that it is against public policy to hold a tortfeasor under such circumstances; not that the tortious act cannot be *in fact* the cause of the damage. But the latter idea, even though not formulated in words, lurks in some opinions. Now the above decisions under the British Workmen's Compensation Act are important as showing that it is possible for our modern tribunals to try the question of fact as to the existence of causal relation without applying the artificial test of whether the effect which actually resulted was probable.

We have just been considering the application of the alleged rule of non-liability for improbable consequences, in cases where the consequences were unintended and the alleged torts were other than negligent torts:

Now we have to consider the application of the alleged rule to unintended consequences of negligent torts. Assume that the consequences were unintended; and assume also that the alleged tort consisted in negligent conduct.³⁷

Should the law absolve the defendant on the ground that the harmful consequence which actually followed was not reasonably

³⁷ In this connection two points should be carefully noted:

(1) Negligent conduct does not *per se* constitute an actionable tort. To make negligence actionable, actual damage to the plaintiff must have resulted from the defendant's negligence. There must not only be a legal duty of care owing from defendant to plaintiff and a breach of that duty; there must also be actual damage to the plaintiff, "caused," in the legal sense, by the defendant's breach of duty.

(2) Many of the cases where it is said that certain kinds of conduct are negligent *per se* "have in reality nothing to do with the doctrine of negligence at all. The duty is peremptory, and always was such. There never was any duty of choice, and negligence means simply non-performance. There is an entirely improper use of the word "negligence" to denote the simple failure to do an act that one is under a legal duty to do, . . . without regard to whether the omission is unreasonable or whether the duty is one of choice at all." Terry, *Leading Principles of Anglo-American Law*, § 200, pp. 185, 186.

foreseeable, *i. e.* was an improbable consequence, one which could not reasonably have been anticipated?

Right here the objection may be raised that the general question we are now proposing to discuss is a purely theoretical one, a question of no practical importance; inasmuch as no state of facts can be imagined which would present it for decision. We are assuming, it will be said, an impossibility; namely, that conduct may be tortiously negligent and yet be followed by unforeseeable consequences; whereas the essential requisite of negligence is that harmful consequences were foreseeable and ought to have been foreseen by the defendant. Else he was under no duty to use care. Unless there was foreseeable danger of harm, a defendant cannot be under any duty of taking care; and hence cannot be adjudged negligent. If, then, it is admitted that the specific harm which actually resulted in a given case was not foreseeable, how can the defendant be held negligent? And of course, if he were not negligent he cannot be held liable for the result.

The answer is, that the harm which was foreseeable and the specific harm which actually resulted need not be absolutely identical. Undoubtedly they must both relate to the same persons or class of persons, and to the same subject matter, *i. e.* to an infringement of the same right in the plaintiff; but these requirements are consistent with wide variations as to the mode of bringing about the harm, and the precise nature and extent of the harm. If there is a substantial likelihood that certain conduct, when pursued by the defendant, will result in some appreciable harm to the plaintiff's person, then the defendant, if he so conducts, cannot escape liability on the ground that he could not foresee the precise manner in which the harm would occur, nor the exact nature of the harm, nor the full extent of such harm. What must be foreseen, in order to establish negligence, is "harm in the abstract, not harm in the concrete."³⁸ The defendant need not foresee "that an injury should occur in the exact way or to the same extent as that which did occur."³⁹ He need only foresee that some injury of a like general character is not unlikely to result from failure to use care.⁴⁰

³⁸ 1 Street, Foundations of Legal Liability, 104.

³⁹ See *Houston, etc. R. Co. v. McHale*, 47 Tex. Civ. App. 360, 367, 105 S. W. 1149, 1151-1152 (1907).

⁴⁰ Compare quotations from Scofield, J., and Rugg, J., in note 47, *post*.

If I negligently frighten my neighbor's horse and he suddenly whirls around thereby upsetting the carriage and throwing my neighbor out, can I escape liability because the chances were that the horse, instead of whirling about, would have dashed the carriage against a wall? And if my neighbor, having an unusually thin skull, though his appearance does not so indicate, is thrown upon his head and suffers great damage, can I claim to have my liability limited to the damage which would have been suffered by a man with a normal skull?⁴¹ If my negligence inflicts a wound upon another and blood poisoning ensues, can I escape liability for the blood poisoning on the ground that it was not a usual consequence of such a wound?⁴²

In *Christianson v. Chicago, etc. R. Co.*⁴³ the defendants contended that, conceding that the defendant was negligent, yet the plaintiff's injuries were not the proximate result of such negligence. They argued that it is not enough to entitle plaintiff to recover that his injuries were the natural consequence of this negligence, but that it must also appear that, under all the circumstances, it might have been reasonably anticipated that such injury would result. They virtually took the position that, in order to warrant a finding that negligence, not wanton, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligent act, and that it (the injury) was such as might

⁴¹ See *Kennedy, J., in Dulieu v. White*, [1901] 2 K. B. 669, 679; *Holmes, J., in Spade v. Lynn & Boston R. Co.*, 172 Mass. 488, 491, 52 N. E. 747, 748 (1899); *Louisville & N. R. Co. v. Daugherty*, 32 Ky. L. Rep. 1392, 1395, 108 S. W. 336, 338 (1908).

⁴² Defendant was held liable for the blood poisoning in *Armstrong v. Montgomery, etc. R. Co.*, 123 Ala. 233, 26 So. 349 (1899) and in *McGarrahan v. New York, N. H. & H. R. Co.*, 171 Mass. 211, 50 N. E. 610 (1898). See also *Marsdorf v. Accident, etc. Co.*, [1903] 1 K. B. 584.

"... the particular consequences of negligence are almost invariably surprises." *Watson, Damages for Personal Injuries*, § 148, citing *Clifford v. Denver, S. P. & Pac. R. Co.*, 9 Colo. 333 (1886).

"It is the unexpected rather than the expected that happens in the great majority of the cases of negligence." *Ross, J., in Stevens v. Dudley*, 56 Vt. 158 (1883).

"The fright of the horse was ordinary, and to be expected. That his conduct when in fright would be unreasoning, insane, and unlooked for was also to be expected. If it were otherwise, it would have been extraordinary, because contrary to common observation."

It is no defense to assert that the township authorities "could not foresee the particular freak of conduct in a terrified horse." *Dean, J., in Yoders v. Township of Amwell*, 172 Pa. St. 447, 455-456, 33 Atl. 1017, 1018 (1896).

⁴³ 67 Minn. 94, 69 N. W. 640 (1896).

or ought, in the light of attending circumstances, to have been anticipated.

These positions were not sustained by the court. Mitchell, J., said:⁴⁴

"This mode of stating the law is misleading, if not positively inaccurate. It confounds and mixes the definition of 'negligence' with that of 'proximate cause.' What a man may reasonably anticipate is important, and may be decisive, in determining whether an act is negligent, but is not at all decisive in determining whether that act is the proximate cause of an injury which ensues. If a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then, of course, the act would not be negligent at all; but, if the act itself is negligent, then the person guilty of it is equally liable for all its natural and proximate consequences, whether he could have foreseen them or not. Otherwise expressed, the law is that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen. Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate, and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow."⁴⁵

So in the often-cited case of *Hill v. Winsor*⁴⁶ Colt, J., said:

"It cannot be said, as matter of law, that the jury might not properly find it obviously probable that injury in some form would be caused to those who were at work on the fender by the act of the defendants in running against it. This constitutes negligence, and it is not necessary that injury in the precise form in which it in fact resulted should have been foreseen."⁴⁷

⁴⁴ At p. 97.

⁴⁵ See also the able opinion of Ross, J., in *Stevens v. Dudley*, 56 Vt. 158, 168, 169 (1883); *Amidon, J., in Chicago, R. I. & P. Ry. Co. v. Stepp*, 164 Fed. 785, 794 (1908); *Shelby, J., in Texas & P. Ry. Co. v. Carlin*, 111 Fed. 777, 781 (1901); *Goode, J., in Lawrence v. Heidbreder Ice Co.*, 119 Mo. App. 316, 331-332, 93 S. W. 897, 899 (1906). See also full statement in 1 *Sedgwick, Damages*, 9 ed., §§ 139, 140, 142, 143.

⁴⁶ 118 Mass. 251 (1875).

⁴⁷ "... when the act complained of was such that, in view of all the circumstances, it might not improbably cause damage of some kind, the doer of the act cannot shelter himself under the defense that the actual consequence was one which rarely follows from that particular act." 36 Am. St. Rep. 810.

Compare *Marshall, J., in Harrison v. Kansas City Electric Light Co.*, 195 Mo. 606, 629, 93 S. W. 951, 958 (1906).

"In the first place, it is not the law that, to constitute a negligent act, the connec-

If the foregoing views are correct, foreseeability of the specific harm which actually resulted is not an essential legal requisite to the establishment of negligence.

Is such foreseeability of the specific harm an essential legal requisite to making out the existence of causal relation between defendant's negligence and plaintiff's damage? Shall the courts make an arbitrary rule that a defendant's negligence cannot be considered the legal cause of any specific damage, unless the occurrence of such specific damage was probable?

Here we encounter two special sources of difficulty. One consists in confounding two issues which are really distinct. The other arises from using the same word — probability — in two different significations.

In every action for negligence, upon the same state of facts two distinct issues may arise: one, "the preliminary issue of negligence

tion must be such that the particular injury could have been foreseen. If injury in some form would be the natural sequence of the negligence, the party guilty of negligence is warned of the danger of his course, and admonished of the necessity of guarding against liability for his negligence, and this is all the warning to which he is entitled under the law." *Scofield, J., in Illinois Central R. Co. v. Creighton*, 63 Ill. App. 165, 169 (1895).

"The test is whether the conditions which led to an extraordinary or even unprecedented accident were such that no reasonably prudent proprietor would have suffered to exist. The particular manifestation of the result of careless conditions is not infrequently quite out of the usual experience, but if the conditions possess elements of negligence, the person responsible for them may also be held responsible for the result." *Rugg, J., in Dulligan v. Barber Asphalt Paving Co.*, 201 Mass. 227, 231, 87 N. E. 567, 569 (1909).

See note in 8 Col. L. Rev. 656-658; and Terry, *Leading Principles of Anglo-American Law*, § 535.

One exception to this general doctrine has been asserted. Conceding that ordinarily a defendant is not exonerated because the particular damage, or the particular manner in which it was brought about (see Terry, *Leading Principles of Anglo-American Law*, § 535, p. 550) could not have been anticipated, yet it has been said that, where an intelligent responsible human agent intervenes between the doing of defendant's act and the happening of the damage, then the test of "prevision or anticipation enters into the problem." In such a case it is alleged that defendant is never liable unless this intervention of the human agent could have been foreseen. See, for example, *Connor, J., in Jennings v. Davis*, 187 Fed. 703, 711 (1911).

We believe that the above alleged exception cannot be maintained as a legal test. Undoubtedly in many such cases it would be found, as a matter of fact, that the negligent conduct of the earlier tortfeasor had so little continuing potentiality that it could not be regarded as a substantial factor in bringing about the final damage; and the intervening intelligent human agent would be the only party liable. But this finding of fact would not be justified in all cases. See later discussion in Appendix.

vel non"; the other, if negligence is found to exist, the issue as to the causative effect of that negligence.⁴⁸

When it is said that probability or improbability is an element in determining either of these issues, we must carefully ascertain in what sense this language is used. Probability may be a legal test, one of the indispensable requisites, to the finding of an issue; or it may be simply a consideration to which jurors can allow such probative weight as they think proper in coming to a conclusion as to a question of fact.

An action for negligence may give rise to three distinct questions.⁴⁹

Question 1. Has the defendant been guilty of any negligent conduct towards the plaintiff?

Question 2. If (1) is answered in the affirmative, has the defendant's negligence caused, as matter of fact, any damage to the plaintiff? Is there, in fact, a causal relation between defendant's negligent conduct and the damage happening to the plaintiff?

Question 3. If 1 and 2 are both answered in the affirmative, is it expedient for the law to deny plaintiff any recovery for damage which has, as matter of fact, been caused to him by defendant's negligent conduct?

In some reported cases decided in favor of defendant, it is difficult to tell upon which of these three questions the decision really turned. The issues were not kept separate and distinct as they should have been.

It is sometimes contended that the probability that damage will result is an essential legal test to be applied in deciding not only Question 1 but also Question 2. This view is, we think, erroneous.

A probability that some harm may happen, not necessarily the specific harm which did actually result, is legally essential to raise a duty of care and thus establish the existence of negligence.⁵⁰ But, if negligence is thus made out, such probability is not a legal requisite to establish the existence of causal relation between defendant's negligent conduct and plaintiff's damage.

It is not generally requisite to show for any purpose the probability of the specific damage which actually resulted. It is not necessary to show a probability of some damage except when the charge

⁴⁸ See 2 Labatt, Master and Servant, § 804.

⁴⁹ Cf. Professor Bohlen, in 41 Am. L. Reg. N. S. 141-142.

⁵⁰ See Professor Bohlen in 41 Am. L. Reg. N. S. 147-148.

is one of negligence; and then it is necessary *only for the purpose of establishing negligence*. It is not an essential legal element in the succeeding steps, (1) of establishing the occurrence of damage, and (2) of establishing the existence of causal relation between defendant's negligence and plaintiff's damage. Such probability is no more essential to the existence of causal relation in negligent torts than in intentional torts.⁵¹ As to both intentional torts and negligent torts, in making out the existence of causal relation, probability is a circumstance which may be weighed by the jury, in connection with the testimony, in passing upon the question of fact — whether the causal relation existed. And probability or improbability might sometimes have practically a decisive effect. But it would not be a *legal* test; would not, as matter of law, be decisive.

To illustrate by examples:

Suppose that a plaintiff sues to recover damages for the breaking of his arm, alleged to have been occasioned by defendant's negligently colliding with plaintiff in the street.

Defendant admits the collision, but sets up three distinct defenses:

Defense No. 1. Defendant was not negligent.

Defense No. 2. Plaintiff's arm was not broken; nor did plaintiff sustain any damage whatever. Plaintiff's claim is purely fictitious.

Defense No. 3. If plaintiff's arm was broken, the break was not caused by defendant's negligence; but was wholly attributable to the negligence of a third person who was mixed up in the collision.

When, and how far, is the probability or improbability of an occurrence a *legal* test whereby to decide the issue raised by any of the above defenses?

As to Defense No. 1:

In order to establish the existence of negligence, it must of course appear that there was a duty to use care and an omission to perform that duty. Whether there was a duty upon defendant to use care depends upon the probability that some harm would result to plaintiff in the absence of care. If there was a substantial likelihood that certain conduct on defendant's part would result in harm to plaintiff, then defendant would often be under an obligation to refrain from such conduct, and his failure so to refrain would

⁵¹ See 1 Sedgwick, Damages, 9 ed., § 143, paragraph 2.

constitute negligence. Here, then, the probability or improbability of the occurrence of some harm to the plaintiff is a *legal* test to be applied in determining whether the defendant was negligent. That is: the jury would be instructed, as matter of law, that they could not find that defendant was negligent, unless they found that defendant knew, or ought to have known, that there was a substantial likelihood that some harm would result to plaintiff in case defendant failed to use care in certain respects.

As to Defense No. 2:

Whether the plaintiff's arm was broken is a pure question of fact for the jury. The probability or improbability that such an event would or would not take place does not furnish a *legal* test to be applied by the jury in determining whether it did actually take place. Where there is a conflict of direct testimony, jurors, as sensible men, may allow some weight to probabilities in coming to a conclusion as to whether a certain fact really happened. But there is no rule requiring them, *as matter of law*, to find that the result which was the more probable was the result which actually occurred. They are at liberty to find, and may sometimes be fully justified in finding, that an improbable story is true, or that a probable story is false.

As to Defense No. 3:

Whether the breaking of the plaintiff's arm was caused by the defendant's negligence is a question of fact; the same as the preceding question whether the arm was broken at all. We think that probability or improbability should not furnish a *legal* test for the decision of the question of causation (causative relation) any more than for the decision of the anterior question whether the arm was broken. Here, as there, the jurors may allow some weight to probabilities in coming to a conclusion as to the question of fact. But, as a matter of legal principle, there seems no ground for establishing an absolute rule of law giving artificial weight to the element of probability in passing upon Defense No. 3.⁵²

There is no reason why probability should be any more essential to actual existence of causal relation in negligent torts than in intentional torts. Because probability is to a certain extent essential to establishing the existence of negligence, it seems supposed by some persons that it must also of necessity be essential to establishing

⁵² This subject will be referred to again later.

the existence of causal relation between defendant's negligence and plaintiff's damage. But the tortious nature of defendant's conduct and the causative effect of that conduct are entirely distinct matters; and what is a requisite element as to the first subject is not necessarily so as to the second.⁵³

The alleged rule of non-liability for improbable consequences, even though confined to negligent torts, and even though giving a restricted meaning to the root word "probable," has been vigorously and ably attacked by Mr. Beven in his work on Negligence,⁵⁴ and by Professor Bohlen.⁵⁵

The general results reached by these learned writers can be given in very short space.

The questions of (1) the measure of duty and (2) the measure of liability for damage caused by a breach of duty are entirely distinct.⁵⁶ In determining whether the defendant was under a duty to take care he is tried by the test of what the average prudent man might have foreseen as the consequence, in a general way, of not taking care; *i. e.* the probability that some harm to plaintiff would result. But if it be once determined that his conduct, tried by that standard, was negligent and that damage has ensued, why should he be entitled to claim that the test of foreseeableness should be applied *a second time* and more minutely to shield him from bearing the full consequence of his proven negligence?

While the fact of negligence is to be determined "by the standard of the reasonable anticipation of the normal man as it appeared to him when he acted," yet the extent of his liability for such negligence, if once found to exist, is to be determined by the test of the actual consequences of his wrong. That is, "once negligence is proven, the anticipation of the wrongdoer cannot limit his liability."⁵⁷

⁵³ See Judge Mitchell's exposure of the fallacy in the extract already quoted on p. 240. See also 1 Sedgwick, Damages, 9 ed., § 143.

⁵⁴ Vol. 1, 3 ed., 88-90.

⁵⁵ 40 Am. L. Reg. N. S. 79, 148; and 41 Am. L. Reg. N. S. 141, 147-149.

⁵⁶ "The measure of the defendant's duty in determining whether a wrong has been committed is one thing, the measure of liability where a wrong has been committed is another." Holmes, J., in *Spade v. Lynn & Boston R. Co.*, 172 Mass. 488, 491, 52 N. E. 747, 749 (1899).

⁵⁷ See Professor Bohlen in 40 Am. L. Reg. N. S. 85, 159.

"Foresight of harm furnishes the test of liability while natural consequence measures the extent of liability."⁵⁸

Or, in still more exact language:

"1. The existence of negligence is to be judged by the probable results of the defendant's acts foreseeable by the normal man similarly situated. . . ."

"2. This [negligence] once being admitted or established, the liability for injuries sustained is to be determined by the natural consequences, those resulting from the operation of the ordinary natural laws, animate and inanimate." . . . "the test of liability [is] no longer the foreseeable probability, but an unbroken natural sequence of event."⁵⁹

Two of the strongest judicial utterances in this direction are to be found in the opinions of Channell, B., and Blackburn, J., in *Smith v. London & S. W. Ry. Co.*:⁶⁰

" . . . where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not, . . . but when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not."⁶¹

" . . . what the defendants might reasonably anticipate is. . . only material with reference to the question whether the defendants were negligent or not, and cannot alter [restrict] their liability if they were guilty of negligence."⁶²

"This liability is determined by looking *a post* not *ab ante*"; by hindsight rather than foresight; "rather a retrospective than a prospective view of the chain of causation,"⁶³

⁵⁸ 1 Street, *Foundations of Legal Liability*, 451.

⁵⁹ Professor Bohlen in 40 Am. L. Reg. N. S. 161.

⁶⁰ L. R. 6 C. P. 14 (1870).

"The true matter of doubt here was not whether the defendants were to be held liable for all the consequences of their negligence, but whether as towards the plaintiff they had been negligent at all." Terry, *Leading Principles of Anglo-American Law*, § 535, p. 553.

⁶¹ Channell, B., *ibid.* 21.

⁶² Blackburn, J., *ibid.* 21.

⁶³ 1 Beven, *Negligence*, 3 ed., 89, note 2; Professor Bohlen in 40 Am. L. Reg. N. S. 85. See 36 Am. St. Rep., note, p. 808.

The rule laid down in 1 Shearman & Redfield, *Negligence*, 5 ed., § 28, though not so bluntly stated, would seem to lead to similar results. That rule is: "A person guilty of negligence should be held responsible for all the consequences which a prudent

Mr. Street, if we understand him aright, takes ground substantially in accord with Professor Bohlen. He says:

"The following decisions support the view that when a case of negligence has been made out, liability extends to all consequences which naturally flow from that negligence." It includes "damage that naturally follows and which in reason can be attributed to the negligent act in question."⁶⁴

After giving a summary of various decisions sustaining the above view, the learned author continues:

"There are decisions which are inconsistent with the principle underlying the foregoing cases. These take a narrower view of liability for established negligence, and, if correct, tend to show that liability for negligence extends only to such specific damage as could reasonably be foreseen upon the particular facts confronting the tortfeasor at the time of his negligent act. In this view a negligent act is said to be the proximate cause only of foreseeable damage. Here the foresight test is applied throughout; on the question of recoverable damage as well as on the question of the existence of negligence. We are of the opinion that this view is erroneous. It seems to have resulted from a very natural confusion as regards the application of the test which is applied in determining the primary question of negligence."⁶⁵

If the view criticised by Mr. Street is adopted, the practical result will be, that damages cannot be recovered for negligence, "unless the damage complained of is such as might reasonably be foreseen in the concrete form which it actually takes."⁶⁶

What answers or arguments are urged against the view of Messrs. Bohlen and Beven?

and experienced person, fully acquainted with all the circumstances which in fact existed (whether they could have been ascertained by reasonable diligence or not), would at the time of the negligent act have thought reasonably possible to follow, if they had occurred to his mind."

This rule, even if nominally retaining the test of foreseeability, substitutes for the average man, so far as knowledge of facts is concerned, an omniscient person: and uses the phrase "reasonably possible" instead of "probable."

Cf. Professor Bohlen in 40 *Am. L. Reg. N. S.* 158.

⁶⁴ 1 Street, *Foundations of Legal Liability*, 111.

⁶⁵ 1 Street, *Foundations of Legal Liability*, 116.

⁶⁶ See 1 Street, *Foundations of Legal Liability*, 451.

First: The law ought to adopt a milder rule of determining the existence of causal relation in cases of negligence than in other torts.

Second: Great hardship, and even ruin, might be occasioned to a negligent tortfeasor, if his liability were extended beyond reasonably foreseeable consequences.

Third: There must be *some* legal test of the existence of causal relation. Probability is the only practicable working test. Hence it must be adhered to, even if it be admitted that it sometimes results in injustice to plaintiffs.

Arguments in favor of the first position:

Negligence is usually less culpable, in a moral point of view, than wilful wrongdoing. The law of negligence is largely a modern conception, and "is in its very nature a compromise."⁶⁷ Why not, then, mitigate the liability of a negligent defendant by applying a less drastic rule of legal cause?

Answer:

These considerations are entitled to weight in determining whether negligent conduct shall be punished criminally; or in determining whether to hold a defendant liable for exemplary (punitive, vindictive) damages, in addition to the damage actually suffered by the plaintiff. But they furnish no sufficient ground for excusing a defendant from compensating the plaintiff for the damage actually inflicted upon him by the defendant's tortious conduct. Negligence, followed by damage, is certainly a legal wrong; and is an infinitely more frequent source of harm to innocent plaintiffs than wilful and conscious wrongdoing.

As to the second position:

The argument based on hardship looks only at the interest of one party, the culpable defendant.⁶⁸ It entirely ignores the hardship of compelling the innocent plaintiff to go uncompensated for the damage he has sustained in consequence of the defendant's negligence.

If it is said that, when a man commits a tort, he has a right to know what extent of liability he is incurring, the obvious answer is,

⁶⁷ See Professor Bohlen in 40 Am. L. Reg. N. S. 83.

⁶⁸ See 1 Sutherland, Damages, 3 ed., § 12.

that "no man has ever a *right* to commit on any terms a *wrong*."⁶⁹ Where the tortious negligence of one man has caused damage to many persons, it has been urged that the tortfeasor would be ruined if his liability were extended beyond reasonably foreseeable consequences. Such an argument "proceeds upon the assumption that, if a great loss is to be suffered, it had better be distributed among a hundred innocent victims than wholly visited upon the wrongdoer." In truth it is better that the wrongdoer "should be ruined by his negligence, than that he should be allowed to ruin others who are innocent of all negligence or wrong."⁷⁰ "Redress to the person injured for whose protection the act was made wrongful is the object, not mercy for the wrongdoer."⁷¹

Formerly, hardship to an innocent plaintiff was used as an argument for imposing liability upon an innocent defendant. Now, hardship to a guilty defendant is sometimes used as an argument for exonerating a guilty defendant from compensating an innocent plaintiff.

"It may be hard to mulct the wrongdoer in damages for [specific] results which the normal man would not anticipate, but it is more unjust that the person injured by the breach of a duty imposed for his protection should not recover for all the loss which has in ordinary course of nature been caused to him by the wrong because the wrongdoer [while able to foresee that some harm was likely to result] could not foresee the full effect of his act. . . . the loss to the plaintiff is as great, his right to recover should be as certain, if the loss be a natural result of the wrong, whether the defendant intended the whole damage to result, or should have known it would occur, or could not possibly foresee the extent of the consequences of his act."⁷²

Upon the question whether the law should recognize a general rule of non-liability for improbable consequences, two compromise views have been suggested. Both involve practically a material modification of the alleged rule.

⁶⁹ 1 Bishop, New Criminal Law, § 327, note 3.

⁷⁰ See Lawrence, J., in *Fent v. Toledo, etc. Ry. Co.*, 59 Ill. 349, 361 (1871); Christy, J., in *Hoyt v. Jeffers*, 30 Mich. 181, 200 (1874); 36 Am. St. Rep. 823, note; Valentine, J., in *Atchison, T. & S. F. R. Co. v. Stanford*, 12 Kan. 378, 379 (1874).

⁷¹ Professor Bohlen in 41 Am. L. Reg. N. S. 148, note 28.

⁷² Professor Bohlen in 40 Am. L. Reg. N. S. 80.

One way is to say, that the law requires a less degree of probability in legal cause than in determining the question of negligence *vel non*.⁷³ This view, if adopted, will hardly reconcile all the authorities. But why should this distinction be made, and where can the line be drawn as to what lesser degree of probability will suffice? If foreseeableness is a requisite to legal cause, why not require as great a degree here as in determining the prior question of the existence of a duty to use care?

Another way is presented in a recent able work, Salmond on Torts. The learned author, as we interpret him, practically asserts that there is no liability in a case where "it is not merely the means but the end itself which is improbable." But he thinks that the rule of non-liability for improbable consequences does not apply to a case (does not prevent recovery in a case) where a foreseeable final result was brought about by unforeseeable means.⁷⁴

The number of actual cases to which this distinction would apply can hardly be large. In most cases where the defendant sets up the defense of improbability, not only the specific method but the specific ultimate result was unforeseeable. Moreover, the distinction seems inconsistent with a general rule of non-liability for improbable specific results. And, even if this difficulty could be got over, the doctrine would not account for or reconcile the cases where the actual damage far exceeded in extent the foreseeable damage, and yet the defendant was held liable for the full amount.

Another view has been advanced, which seems based on a distinction between "direct" and "consequential" damage.

"A plaintiff can recover damages for the direct injury, even though the damages are not such as could have been contemplated." But "where damages are claimed for any other than the direct injury, compensation will not be given unless the injury is a natural consequence of the tort or breach of contract."⁷⁵

⁷³ Suggested, but not finally indorsed, in Terry, *Leading Principles of Anglo-American Law*, § 551.

⁷⁴ "Damage may be natural and probable, although one of the intervening links in the chain of causation may be extremely improbable. For if it is likely that the damage will happen in some way, it makes no difference that the way in which it does actually happen is an unlikely one." Salmond, *Torts*, 2 ed., 109. Cf. Terry, *Leading Principles of Anglo-American Law*, § 535.

⁷⁵ 1 Sedgwick, *Damages*, 7 ed., 130, 131, notes. But cf. 1 Sedgwick, *Damages*, 9 ed., § 121 b.

We can see no sufficient reason for this distinction. If the so-called "consequential damage" is distinctly traceable to the tort as the effective cause, the defendant is none the less liable because of an interval of time or space, or because the effect is produced through the operation of intervening agencies. The cause of a so-called "direct injury" may be more immediately obvious and more easily provable. But the "consequential" damage may equally be the product of the defendant's tort, and that tort may equally be a substantial factor in subjecting the plaintiff to the damage complained of.

Another plea for the nominal retention of the alleged rule is based upon the view that the rule has been so explained, and qualified, and honeycombed with exceptions, that it is now seldom applied in such a way as to bar recovery for damage actually caused by the defendant's tort. Without going through all the possible qualifications or exceptions, attention may be specially directed to the doctrine that the specific consequences, the precise form of damage, need not be foreseeable. Under this doctrine, it is thought that courts can "mitigate" the general rule "whenever its operation seems too harsh." Indeed in many cases, the adoption of this doctrine nullifies the rule. Professor Bohlen goes so far as to say:

"It will be found that even in those jurisdictions where the rule of responsibility is generally broadly stated as for the probable consequences alone, that is in practice modified, wherever the negligence is proved or admitted to exist, into a rule in effect allowing a recovery for all the natural consequences though unforeseeable."⁷⁶

If, then, the operation of the objectionable rule is practically abolished, why spend time in attempting to prove the intrinsic incorrectness of the rule? What matter if the natural interpretation of the rule is evaded by arbitrary qualifications, illogical exceptions, or incongruous subsidiary rules? If these various methods do actually prevent unjust applications of the rule, what harm is done by the nominal retention of the rule?

To these queries there are two answers:

First: We think that the incorrect rule still has more influence

⁷⁶ 41 Am. L. Reg. N. S. 148, note 28.

than Professor Bohlen seems disposed to allow. Some erroneous recent decisions seem traceable to it; especially in cases where the facts do not obviously suggest the application of the doctrine of *Hill v. Winsor*.⁷⁷

Second: It is not desirable for the law to use roundabout methods in order to arrive at a right result. Still less is it desirable for the law to affirm inconsistent propositions, which are contradictory to each other. It is better squarely to reject the alleged rule of non-liability for improbable consequences than to affect to maintain the rule, and then practically get rid of it in a large proportion of cases by applying qualifications which are not consistent with the natural interpretation of the rule. It seems absurd to retain it as nominally the general rule, and then explain that, if construed in its natural meaning, it does not apply in the majority of cases. Such a course does not tend to promote legal symmetry or clearness of thought; and it is especially perplexing to beginners in the study of law.

Equally objectionable is the method of evading the operation of the alleged rule by relying on a so-called "conclusive presumption." The law is sometimes said to "conclusively presume" that a defendant foresaw what he did not and could not foresee. What this really means is, that the defendant is held liable for consequences irrespective of their foreseeability.⁷⁸

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[To be concluded.]

⁷⁷ 118 Mass. 251, 259 (1875).

⁷⁸ For criticism of the term "conclusive presumption," and of its use to enable the court to lay down a rule of substantive law under the guise of a rule of evidence, see 1 Austin, Jurisprudence, 3 ed., 508-509; Gray, Nature and Sources of the Law, § 228; 4 Wigmore, Evidence, § 2492; 2 Chamberlayne, Modern Law of Evidence, §§ 1145, 1146, 1159, 1160.

SHOULD THE LAW TEACHER PRACTICE LAW?

THE law teacher who has done the arduous pioneer work of introducing a new mode of teaching law by case-books is necessarily excused for never having practiced law. It may be conceded at once that he could not have done his pioneer work and become a practitioner at the same time. It may be conceded also that the training of the law teacher which comes from the struggle to make case-books and to introduce teaching by case-books, is a fair substitute for the training which practice at the bar will supply. The law teacher who while still a beginner settles down to the completion of a great work like Wigmore on Evidence is also readily forgiven for never having practiced law. The law teachers of to-day who are over forty or forty-five, and who have never practiced, met the problem of their professional development and training twenty or twenty-five years ago. It is neither becoming nor just that anyone should now in the retrospect say that they did not meet the situation in which they found themselves in the best manner possible. The number of law schools is, however, increasing, especially in the Mississippi valley, the south, and the far west. There is a corresponding demand for law teachers, and the recent law school graduate with a brilliant record as a student is more and more called upon to become a professional law teacher at the time of leaving the law school, or very shortly afterward. The rule is being more and more rigidly enforced that these men shall devote all their time to the teaching of law and shall not practice in any degree. Accordingly these young men are going into law school faculties with no outside distractions whatever. They are assuming that they must live upon their law school salary, and that alone. At the same time these young men have no pioneer work to do in making case-books and justifying their use. Most excellent case-books have been made for them, and the second editions are out. The number of such young men who will, before they are forty, seriously undertake a work like Wigmore on Evidence is negligible. The question is a vital and important one:

What shall these young men who are going into law teaching on the basis of not practicing at all, do to develop their powers? What is the law school most interested in having them do? Shall they practice law in addition to and at the same time that they carry on their teaching?

Let there be no misapprehension about the scope of the general question. It is not: — Shall the law teacher be a practitioner who supports himself by his practice and incidentally teaches in the law school? I assume that question is finally determined in the negative, and that when the law teacher is such a practitioner, the problem is to get him out of the law school or to separate him from his practice. The general question which I propound is quite different. Shall the law teacher who is settled in the position of making his livelihood by his teaching, and while continuing so to do, and while independent of any income he may make from practice, yet endeavor from his office in the law school to secure and maintain a limited position at the bar in practice?

Before this general question can be answered we must (1) define what we mean by "practice," (2) agree upon what qualifications in respect to its teachers the law school is most desirous of developing, and (3) fix the general alternative activity for which practice at the bar is to be substituted.

If by practicing law we mean the usual combination of client-care-taking and advocacy — with the emphasis largely on client-care-taking — which is the leading characteristic of practice in the United States, then I should say, decidedly, the law teacher must not practice, and this paper would here abruptly stop. Taking care of clients, as distinguished from handling litigated cases, is an occupation which will always distract the law teacher from the subject matter of his courses and deprive him of the time which he needs to devote to his courses. A great deal of necessary client-care-taking is not law at all, but mere business. The proportion of legal problems and the volume of work and time spent is too small and spread over too many diverse fields of the law. The more a man succeeds as a client-care-taker, the less valuable he becomes as a law teacher. It is premised, and most emphatically, that if the law teacher is to practice at all, he must rigidly exclude all client-care-taking.

The law teacher must practice, if at all, in the handling of legal

problems and not at all in the handling of clients. He must have *cases* and not *clients*. He must serve the needs of lawyers who have the clients and who employ the law teacher because of his expert and special knowledge and skill in handling litigation. He must not be a brief-writing hack or an authority digger, for that occupation not only does not make an expert specialist in handling legal problems, but it leads to an atrophy of personality which a man of talents and ambition cannot afford to permit. The law teacher may practice in the giving of opinions to other lawyers upon legal problems submitted. But the law teacher's practice must not stop here. He must not be merely the man to be consulted for academic aid. That is only a more dignified stage of the authority digger. The law teacher must be the man who is sought as an advocate, — whose personal skill and power in swaying the mind of the court is in demand. The special field of practice of the law teacher should be in the appellate courts. He should have a practice as special counsel in preparing the printed briefs and arguments and the making of oral arguments before those courts. If, as is frequently the case, these appellate tribunals discourage oral arguments because of the wretched character of those which the bar is now offering, the law teacher should take advantage of the opportunity to make the better sort of oral arguments and to shine by comparison. The law teacher in his appellate court practice should always appear as special counsel. When he is the sole author of the printed briefs and arguments this fact should be made to appear before the court so that the whole responsibility for the conduct of the case will fall upon him. As far as possible the law teacher should take some part in the more difficult work of handling litigated cases in the trial court, where the ultimate result depends much on the way the case is tried below and how questions of fact are handled. In all his practice, of whatever sort, the law teacher should rigidly impose upon himself the rule that he will not deal directly with clients. This will place him above the slightest suspicion of ever using his position to secure for himself the clients with whom he has come in contact in his work for other lawyers. The law teacher's practice must be to some extent specialized, and very naturally in the line of the subjects which he teaches.

Practice in this restricted sense — handling legal problems and litigated cases instead of the miscellaneous affairs of clients —

we will call, for want of a better name, advocacy. The law teacher who practices thus we will speak of as the law-teacher-advocate.

What qualities is the law school most interested in developing in its teachers? The law school is primarily interested in developing the most effective law teachers — men who can handle a class successfully, determine what problems are vital, what views are sound and impart these views to the students. It wants also men who are or who may become successful original thinkers — leaders in the promotion of ideas which are to be a factor in the development of the law. It wants also men who during their active life may contribute some social service in the cause of law reform. Each individual school is interested in securing law teachers with the above qualifications, who will not leave that particular institution for another because a few more dollars of salary is offered.

The question of whether the law teacher should practice is of course a relative one. Clearly he should practice as an advocate, rather than not do anything at all except meet his classes. The real question, therefore, always is: Shall the young law teacher practice as an advocate rather than do something else? What is that "something else"? Clearly it is not the pioneer work of making case-books and establishing a new system of teaching. That has been done. Clearly it is not the preparation of a great work like Wigmore on Evidence, for experience shows that that is too exceptional an achievement. It is the revising of case-books, keeping up with recent decisions from all over the English-speaking world, writing the average number of law review articles, preparing textbooks or encyclopedic articles of a dignified character and substantial proportions. This is a fair description of the usual activities of the present-day law teacher, who, as the phrase goes, "is giving all his time to the law school."

The specific question at issue has now become this: Will the young man of to-day, fresh from honors at a law school, who becomes a professional law teacher and who spends the first fifteen or twenty years of his life as such teacher in securing and maintaining a position at the bar as an advocate, be more apt in the long run to become a teacher with the qualifications which the law school wants, than the man who, during the same period, leads the usual life of one who is giving all his time to the law school?

There are two principal reasons for answering this question

in the affirmative and several less important ones: *First*, the time has come when the demand is not for mere speculation as to what the general law is or ought to be, but for the testing and establishment of the speculations of the great teachers already made. The law teacher should practice as the means of bringing his own and the speculations of the masters as to what the law is or ought to be to an actual test in the laboratory of the courts. *Secondly*, the law teacher should practice in order that he may obtain the training and experience which comes from conflict with the minds of mature men quite as acute, if not more so, than his own.

Let us consider the first of these two principal reasons.

Langdell said that law was a science. This meant that the rules of law were to be induced from cases as the principles or generalizations in the natural sciences are induced from observation of particular data. If the cases are the complete data, then the reaching of the principle is only a matter of skill in analysis and logic. If the cases be incomplete in any considerable degree, analysis and logic, however skilfully used, result only in speculation based upon partial data. If the scientific method be still pursued, these speculations must be verified and tested by experiments in the laboratory of the courts.

So long as the law was regarded as the rule established by the English cases, the data from which to derive principles might well be regarded as largely complete. There was then demanded of the law teacher great skill in analysis and logic. But the moment one is projected into half a hundred different jurisdictions, each with woefully incomplete data from which to ascertain what the law is, and each with a court ready to declare the law in a particular case by reference to conflicting data elsewhere, assertions as to what the principle of law may be or should be become to a large extent mere speculations founded upon partial and imperfect data. The speculations may be most illuminating and in every way worthy, but they do not become scientifically reliable till they have been proved and adopted by the courts.

Professor Langdell's work was more in the way of analysis and logical inference from the fairly complete data of the English cases to principles which they established. Professor Ames, on the other hand, gave us to a greater extent brilliant speculations as to what the law ought to be, based upon data which were partial and

incomplete for any particular American jurisdiction. Professor Ames' contemporaries have done and are doing the same thing. It may fairly be said that it is the aim of law teachers generally to continue the speculations which Professor Ames and his colleagues began, and that the accepted ultimate function of the law teacher is to further this process of speculation. It is these speculations which make what we now call "general law." This body of so-called "general law" is merely professor- or text-book-writer-made-law. Its principles are, in any particular jurisdiction where the data of cases are incomplete, mere speculations as to what the law ought to be.

In the hands of men who were great enough to found a new system of teaching and construct case-books giving new life to legal principles, the making of great and valuable speculations as to what the law ought to be for American jurisdictions was natural and to be expected. The great speculations were the crowning effort of a life of immense labor in the making of case-books and the struggle to develop principles. We are, however, entering upon a period where the speculations are apt to become decadent. The law teacher of to-day is making his speculations too easily. He has too much license to speculate without the labor most necessary to make his speculations valuable and enlightening. The prevailing attempt to follow Professor Ames as an ideal, without its being necessary to do the pioneer work of making case-books, inevitably leads to a flood of easy speculation which is even now bringing all speculation into contempt. I am sure the younger law teacher of to-day is constantly more and more aware of the suspicion in which judges and lawyers hold his so-called theories. This is the same suspicion which a physicist would invite who advanced hypotheses from imperfect data and then did not take the trouble to subject them to such tests as were available in the laboratory. The suspicion is merited. Speculation without proof cannot be permitted to go on indefinitely. The first generation of teachers after Ames and Langdell and Thayer are in their prime. It may be all right for them to carry on their speculations under the guise of statements of "general law." But to permit the second generation of teachers from Ames and the third generation to continue in the same way spells decay and disaster for the law teaching profession. The young men who are entering the law teach-

ing profession to-day must begin to subject the speculations of their masters and themselves to proof by bringing those speculations to the test of actual litigation in the courts.

We know that Professor Ames hoped that by text-books the great speculations of the men of his generation would be brought to this test. That hope has not been fulfilled, nor is it likely to be. In any event such books only reduce to more permanent form the speculations of the masters. To bring these speculations to the real test you must have men, — men who have convictions and enthusiasm and who can fight skilfully. Professor Gray has reduced many of his most valuable views to permanent form in text-books and articles, and yet it takes men who are on the firing-line of actual litigation in a given jurisdiction to bring them to the proper test in the courts of that jurisdiction.

Professor Ames believed also that his students would be the men to make the fight for his speculations in the several states of the Union. If, however, he thought that the ordinary student who went out into client-care-taking and all the miscellaneous activities of legal business would ever bring his theories to the test in the laboratory of the courts he was much mistaken. Even a man fairly active in litigation may not be an especially effective advocate for the speculations of the masters. The second and third generation of law teachers from Ames are the students of Ames and his colleagues, whether they sat under them personally or not. They are the selected ones to bring the great speculations of the masters to the test of actual litigation in every state of the Union. These men can specialize in the handling of litigated cases and in the handling of cases in related groups of subjects which will give them an intimate experience with practically every important legal problem which arises in those subjects.

The foremost and fundamental reason why the young law teacher of to-day should accept and act upon the principle that he must secure and maintain a position at the bar in practice in a particular jurisdiction is this: There is an actual demand for the curtailment of speculations as to what the law ought to be. There is on the other hand a correlative movement for the promotion of direct efforts to bring the great speculations of the recent past to the test of experience in the courts and to secure their establishment in the law. These steps are imperative for the preservation of the

speculations of the masters and for the keeping up of the standard of legal education and the position of the professional law teacher. The law teacher is the man to answer this demand.

The second principal reason why the young law teacher should practice law is that such a practice as we have described will give him a training which must react most favorably upon his work as a teacher. This will, I think, be readily conceded. The law teacher will, in the preparation of cases for hearing, especially when these cases are to a considerable extent confined to the subjects which he teaches, work out with unusual completeness the legal problems arising in the courses which he teaches. Such researches, stimulated by arguments in the courts, will tend in an extraordinary degree to keep his courses fresh and vital. It will be conceded also that the law-teacher-advocate will certainly have the value of his opinions and the soundness of his learning and judgment in forecasting what courts will do, brought to the awful test of actual litigation and analysis by lawyers and judges quite as able, if not abler, than himself. He will find himself arrayed against eminent counsel and before a court, to defend premises which he may be assuming as a matter of course in the class room. But, more than this, he must develop a learning and ability which will satisfy, not the layman who picks out a lawyer often from motives of personal friendship, but other lawyers who are critically canvassing the bar for a competent junior or a winner in an important case. It must be conceded also that our law-teacher-advocate will acquire a valuable first-hand knowledge of how courts think and operate. He will acquire power in the accuracy and soundness of his thinking, and effectiveness in his mode of expression. Experience as an advocate will not only assist the law teacher to sound and matured views respecting the law, but it will give him an unusual degree of effectiveness in handling a class. It will furnish a sound basis for social service in law reform, and cannot but have a beneficial influence in guiding the development of the original thinker and the solution of ultimate problems.

There are, however, some other advantages (of perhaps less importance) which will come to the law school by reason of the fact that its teachers practice as advocates.

The effort of the young law teacher to secure a position at the bar will make his final success as a teacher and a scholar more

worth while to him and the law school by postponing the achievement of that success and making it appreciably more difficult to obtain. The young law teacher of to-day is succeeding too easily and too quickly. His case-books are made for him. The analysis of the cases which he uses has been taught him while he was a student. In ten or fifteen years a fairly industrious man may have taught a considerable number of courses creditably. He may have revised a case-book and done his share in writing law review articles and student's text-books. He may have been in quick succession a member of several different law school faculties at a constantly increasing salary. He may even be called a conspicuous success as a teacher giving all his time to law teaching. But he has succeeded too easily and too quickly. He has nothing before him. If he is in reality a man of energy and ability, at forty or forty-five life as a law teacher will become empty and stupid. He will begin to look for a law school deanship or the presidency of a university where he may find a new field for his talents and energies. The man most apt to be thus spoiled as a law teacher is the very man of energy and ability which the law school wants to keep, and from whom the law school expects some unusual work in the last twenty years of his life. If the same man had, during the first ten or fifteen years of his life as a teacher, been striving to make a position at the bar for himself as an advocate he would at the age of forty or forty-five have been just beginning to succeed both as a teacher and as a lawyer. He would be just beginning to enter upon the most productive years of his life as a teacher. The chances that the law school would obtain from him some services of unusual worth would be good indeed. His views would be matured and his judgment ripened by his experience as a teacher and as an advocate. He would probably be a man with deep convictions about the law.

The demand of the law school that the young law teacher of to-day shall practice as an advocate, and the assistance of the school and his older colleagues to that object will have an excellent effect in attracting to the teaching profession the law school graduate who is the most able in the handling of legal problems. These men are really fitted for becoming advocates. They almost always look forward to a professional life where they will present to real courts solutions of legal problems like those that they handled in the law school. They really expect to practice as advocates. Then comes

the awakening. They find that client-care-taking and brief-writing hack work have swallowed them up. Neither road leads to advocacy. The more clients they have the more sure they are to throw away their case-books. The continuous doing of brief hack work leads to an undesirable atrophy of personality. In both directions lies disappointment for the brilliant law student. If, however, it once becomes known that law teaching and a position at the bar as an advocate go together, a large number of able young men who now shun law teaching will become eager competitors for the places in law schools in the jurisdictions where they wish to practice.

Law faculties cannot be brought to a high standard of excellence unless there is some means whereby the less efficient can be eliminated and replaced by the more efficient. Change which results in replacing one man with another just as good is, for a time at least, unfortunate. Change which results in the replacing of an especially able man by a less efficient one, or one who because of youth and inexperience must be developed, is a calamity. Yet this is precisely what is happening to-day in many law schools which cannot pay the highest salaries. Their most promising young teacher is being called to some other school at a few dollars more a year, and he is going. These schools have constantly to face a condition where the less promising men stay and the more promising ones go. It may, however, be predicted with a fair amount of certainty, that the younger law teacher who is struggling with some chance of success for a place at the bar as an advocate, and the older teachers who have made such a place, cannot be induced to leave the school to go to another jurisdiction for a few hundred dollars a year higher salary. It is doubtful whether anything another law school has to offer would induce such men to leave. In rare cases, no doubt, where the law teacher who has been successful at the bar as an advocate wishes to retire from practice entirely and devote himself to some ultimate work of scholarship, and a position carrying an excellent salary and high honor is offered him, he will accept it. But even in the rare case, where such a loss occurs, the law school will have had many years of valuable service from an eminent man. It will thus turn out that the only men which another law school can ordinarily secure for a slight increase in salary will be those who have obtained no position at the bar as advocates, or who, though trying to obtain such a position, see little or no prospect

of success, or who do not care for such a position. In most instances the law school can well afford to lose these men and replace them with men who can secure a position at the bar as advocates. The net result will be that schools which, as a general rule, require their young teachers to secure a position at the bar as advocates will in the long run keep their more aggressive and efficient men and lose their less efficient. By this means its faculty will in time be brought to an exceptionally high degree of efficiency.

So much by way of argument may be conceded in favor of the young law teacher of to-day endeavoring to secure and maintain a position at the bar as an advocate, instead of leading the life which is summed up in the phrase "devoting all his time to teaching." On the whole it will probably be admitted that the law teacher who receives a training as an advocate will be more apt to have those qualities, which the law school is interested in securing and developing, to a greater degree than the man who has never practiced but has given all his time to teaching. It may even be admitted also that he will more effectively serve the law teaching profession and the cause of legal education. The real argument against the law teacher practicing will be that there are insuperable practical objections to it. First, it will be urged that there has as yet been no division at the bar in this country — that there is no established professional lawyer's lawyer, or advocate, or barrister. Hence it will be argued that the law teacher could not become an advocate if he wanted to and had the time and ability to succeed greatly at it. It will be objected, secondly, that the law teacher has no time to practice. Finally, it will be said that the law teacher who succeeds as an advocate will leave the law school and devote all of his time to practice.

Let us consider the first of these objections:

It is true that there is as yet no well-defined division at the bar in this country and no well-defined profession of advocacy. But it does not follow that practice as an advocate is impossible. If there is an economic demand for such a division at the bar and for the professional advocate or lawyer's lawyer who is to practice as an expert and specialist in the handling of litigated cases in the courts, then such a position is open to the law teacher as much if not more than it is to anyone else. The fact that there is little actual competition may indeed give the law teacher an opportunity

now which he will not have a generation hence. The economic demand for the advocate has arrived, and in the large centers of population is so insistent that it must be answered in some way. Client-care-taking has become so absorbing — especially in large centers of population — that lawyers who are most successful in having clients no longer find it convenient or profitable to handle their litigated cases for them. They have had to give up studying law. Their object is to find out enough law to steer a safe course and keep their clients out of litigation and settle their cases. This they do more and more by pushing a button and calling upon a clerk in the office. But that knowledge of how courts are going to solve or ought to solve the more important and difficult legal problems and how important litigation involving these legal problems is to be conducted cannot be obtained from the hired underlings of the client-care-taker. The demand for the advocate or lawyer's lawyer who is a student of the law and who is an expert in the conduct of litigation is here. This, together with the fact that there has been a rather slow and unintelligent answer to the demand in very narrowly trained and often poorly equipped specialists, gives the law teacher with his broader and more scholarly training an opportunity which should not be underestimated.

It is of course not enough that there should be an opportunity for the law teacher to succeed as an advocate. He must to a certain extent make a special preparation for the advocate's work. But this is well within the reach of successful law teachers in a comparatively few years.

It is essential that the law teacher should master to an unusual degree the state of the local law on some principal subject or group of subjects which he teaches. I had almost said that he must learn some real law as distinguished from what a very talented law teacher recently called "Cloud Cuckoo Town Common Law." I am sorry that the law teacher will be obliged thus to soil his mind with the parochial declarations of a given state supreme court. He ought, however, to master the local law on one principal subject or group of subjects in from four to eight years. All this time he can be teaching and becoming more proficient in the general law by reason of the criticism he may find it necessary to level at the local law. Having once mastered the local law and obtained thereby a foothold in practice, he will find himself constantly bringing to the

test of actual litigation in the courts his own and the speculations of his masters. In his own phraseology he will be constantly dealing with problems of "general law."

The law teacher cannot, however, stop with the collection and analysis of materials which make him a master of the local law. His proficiency must become known to the local bar. A legitimate, dignified, and effective way in which this may be done is for the law teacher to write a book or books and articles dealing with the state of the local law and its special and peculiar problems in the subjects which he teaches. He will be judged by these books and articles. If they are what they should be, bench and bar alike will use them. The author's position at the bar will then be in some degree assured.

There is nothing unusual about this prescription for securing a position at the bar as an advocate. It is the same as that which has been written generation after generation for the briefless young English barrister. The list of books collecting, analyzing, and criticizing the parochial deliverances of the English judges written by young men who have afterwards become leading barristers and eminent judges is familiar to all. Many more have been written by men who obtained fair but not conspicuous positions at the English bar.

Another thing that the law teacher who would practice as an advocate must do, is to stay in one place. Once over the line into another jurisdiction and his foundation of expertness in the local law and his relations with the local bar built up during several years are at once shattered. I think it was one of Roscoe Pound's rare pieces of good fortune that he was not induced to leave Nebraska till he was ready to give up practice.

The second objection to the law teacher practicing is that he has no time for it. I think this is the reason which weighed most with Professor Ames. He believed that practice was a distraction to the teacher. He no doubt saw clearly that in general a teacher could not do the pioneer work of making case-books and introducing the case-book method of teaching and also practice. To that I agree. Then "practice" to Professor Ames meant, I think, only one thing — that was the American combination of client-care-taking and advocacy, with the emphasis too often upon the client-care-taking. He saw that client-care-taking was inconsistent with the

functions of a teacher. Again, I agree. The moment, however, that we select for the law teacher a position at the bar as an advocate, with the client-care-taking eliminated, and when we reach a point where it is more important that speculations as to what the law ought to be should be proved and tested than that they should be made, we have really presented a situation about which Professor Ames never expressed, or, as far as I know, had any opinion at all.

A priori it seems reasonable that the securing of a position at the bar as an advocate should not be at all impeded by lack of time. The probable course of events will be something like this: For the first five or six years after the law teacher has graduated from the law school and taken up teaching he will be studying up his courses, mastering the local law, and writing a local-law text-book on some principal law school subject which he teaches. Is that too much to ask? Is there anything in this inconsistent with his law teaching? During this period, of course, there will not be any practice. He will be as clearly giving his whole time to the law school as some man who never practiced and who never expects to. If our young law teacher gets into any litigation towards the end of his first five years' teaching, it will be as a junior or "devil" without pay. The case will very likely be for some social service organization which is testing the constitutionality of some act of the legislature or aiding in the enforcement of some civil service or primary law. It may be a desperate case for some poor person who can offer only a contingent fee. In the next five years our law-teacher-advocate may be expected to impress other lawyers with his knowledge of the local law and his ability in solving difficult problems upon which the local courts have not yet ruled. His capacity and judgment as an advocate will be tested and developed with each case that he may handle. He may at the end of ten years have six or twelve litigated cases a year, involving important and difficult problems. The actual number of hours spent in court in these cases may be so slight as not to be noticed by the law school at all. If three of the cases are heard between June first and October first, and six are scattered through the rest of the year and take one day each, and half of these fall on days when the law teacher has no classes, the actual absence of the law-teacher-advocate from his classes on account of appearances in court will hardly be remarked.

The fact that in all the appellate courts the arguments are strictly limited to an hour or two hours on a side is a great aid to the law teacher's practicing in these courts without any interruption of his class-room work. The principal work of the law-teacher-advocate will be in the way of preparation of his cases for hearing. This will not differ in character from much of that which must be done in compiling a text-book or in doing extra work in the preparation of courses.

So far there can be nothing to cause anyone to say that the law teacher has not time for both teaching and practice as an advocate. If, however, the law teacher is fairly successful as an advocate, the opportunities for practicing his profession of advocacy will increase after he has been at the bar for ten or fifteen years. It is then that he will find opportunities to practice, which, if accepted, will make teaching difficult. At this point the law teacher may raise his fees and thus discourage retainers, or he may reduce his hours of teaching from seven a week to five a week, or even four, or he may do both — depending upon how great a success he has made. I do not know what steps Professor Gray has taken, but I believe he has for over thirty years given four hours a week at the Harvard Law School. I can hardly imagine any but a practice as an advocate in long civil and criminal jury cases that would prevent the devotion of that much time to the work of a law school. In this way it is perfectly feasible for the law teacher to go on teaching and practicing for the rest of his life. But if at the age of forty-five he has tired somewhat of practice — if the bench seems, as it well may, unattractive — if he has exceptional capacity for scholarship, he may move in the direction of giving up practice entirely in order to enter upon some ultimate field of authorship.

The last objection to the law teacher practicing is that he will succeed as an advocate and leave the law school entirely. No doubt this will happen. It is now clear, however, that it will not happen till the law teacher has reached forty or forty-five and been teaching for fifteen or twenty years. If at the end of that period the law teacher so conspicuously succeeds as an advocate that he can give up teaching entirely, the law school will have had many years of service from a more than usually able man.

But it by no means follows that because the law teacher becomes a successful advocate at the age of forty or forty-five he will at once

abandon law teaching. Success as an advocate means hard work — often requiring the physical powers of a man under fifty — and, except in the rare case, very moderate fees. It is quite possible for the successful advocate to tire of practice. The logical place for such a man is the bench. But under present conditions in this country such places are hopelessly unattractive. The short terms of office, the necessity of standing for election and consequent dependence upon extra legal political machines for a nomination, and the political landslides which throw the judge out of office without any reference to his merits as a judge, are not the only unattractive features of a judgeship. The rotation by judges in the trial courts among all sorts of cases, civil and criminal jury trials, trials at law and in chancery without a jury, appellate court hearings, and juvenile court hearings, absolutely prevents the judge from becoming expert in any branch of his work. Association also with a considerable number of other judges who have no real head, in an endeavor, with the minimum amount of organization, direction, and judicial power, to dispose of immense dockets of cases in a large center of population, is something that the able expert with ambition will be pretty sure to shun. In the highest courts of appeal the great amount of closet work in examining briefs and abstracts and writing opinions will make places in such courts unattractive to many. I believe that when the law-teacher-advocate tires of practice, he will, in many cases, be well satisfied to drop practice for the law school rather than leave the law school for practice or the bench. Ezra Thayer and Roscoe Pound are conspicuous examples of men who have, after fifteen or twenty years of practice, preferred to give up practice entirely for law teaching. If the law-teacher-advocate does not give up practice entirely for teaching, he may at least be expected to continue his teaching in some degree to the end of his active life.

The law school may very properly expect that teachers who work into practice as client-care-takers will very soon drift out of teaching. But it need fear no general exodus of those who succeed in practice solely as advocates and counselors.

A law school with a faculty composed of young men, which was attempting in a practical way to build up a teaching staff in which each man was doing his part towards securing a place at the bar as an advocate, would be one where the subjects taught were divided into groups with as much regard as possible to special fields of prac-

tice; where the best case-books on the general law were used; where the teachers were in the process of mastering, or had actually mastered, the local law in their respective subjects and were preparing to publish, or had actually published, text-books on the local law of those subjects; where the teachers were writing for a local law review special studies in the problems of the local law and notes to recent cases decided by the local supreme court; where the teachers were busy with local law reform, and mutually supporting each other in the effort to obtain from other lawyers employment in the handling of litigated cases raising for the most part questions in the subjects of which they had made a special study; but where the mastery of the local law and practice as an advocate were regarded not as an end in themselves, but only as the means of bringing to the test of actual experience in the laboratory of the courts the speculations of themselves and their masters and as the preliminary training for an ultimate function as a scholar.

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NOTE. — The utterance of a gifted teacher as to his calling moves a fellow-worker in the same field to join in the discussion, even if it be only to agree or to throw the emphasis a little differently; and the editors have kindly allowed me to add a few words to Mr. Kales's interesting article.

Much that is fundamental in his argument calls for nothing but cordial approval; as, for example, his elimination at the outset of the practitioner whose teaching in a law school is incidental to his practice. The theory of legal instruction represented by such methods is as remote from present conditions as are the days when Judge Story could divide his activities between the Supreme Court of the United States and the Harvard Law School without injustice to either. Mr. Kales's recognition that teaching law demands and deserves all that is best in a man, and that the teacher should renounce all practice which will not make him a better teacher, is wholesome and inspiring. This principle naturally prohibits "client-care-taking"; and with it must inevitably go any substantial trial practice. Mr. Kales does not in terms make this last application. Indeed he recommends participation in trials "as far as possible." But the whole burden of his argument concerns only questions of law and appellate tribunals, and the limitation to what is "possible" renders unnecessary any disagreement with him about trials. The uncertainty when a trial will begin, and once begun when it will ever end — the conflict between the imperative demands of a trial court, and the no less imperative necessities of a fixed teaching schedule — these matters of detail are enough of themselves to show the impossibility of combining a trial practice with proper teaching. Accordingly we do not reach the question how much more serious an encroach-

ment on the teacher's time is made by "client-care-taking" than by the wakeful nights of trial practice, and its absorbed and exciting days.

So far, therefore, no conflict with Mr. Kales's views suggests itself. The advocacy which he recommends consists in arguing questions of law, and there need be no hesitation in recognizing that he marks out for the young teacher an interesting and worthy career. In some part, at least, what he desires must come about of itself, and without any special effort of the teacher, if he is the right kind of man, and if the law school occupies its proper place in the community. If so, he cannot fail to be consulted as an authority in the subjects which he teaches. Such consultations will help to keep him in touch with the bar and with affairs, and they may very naturally call him into court. Whether they do this last or not they cannot fail to enrich his experience and increase his value to his pupils and to the institution which he serves. Only a very narrow view of teaching would condemn such practice as this.

But whatever the merits of the proposed programme for *some* teachers, of course it is not to be recommended for all. Since teachers of law are not so free from individual variation as to realize in fact the ideal standard of uniformity presented by our familiar friend the "ordinary prudent man," it would not be seriously suggested by so sensible and acute a writer as Mr. Kales that any particular scheme of life would fit all cases. On the contrary he takes note of several worthy substitutes for his proposed work of advocacy, for one of which at least — the production of treatises of the highest class — the need is crying. His recommendations, which are addressed only to teachers beginning their work immediately on graduation, must therefore be still further limited to a particular class among such teachers. What are the characteristics which bring a man within that class?

First and foremost, as we are told, he will not "seriously undertake" the preparation of even a single really great treatise. This is a circumstance which calls for attention. Why has he made this choice? Is it because he cannot hope to equal the great work which Mr. Kales names? Surely it is a sorry thing if a young man beginning his career is to set his ideals no higher than his probable attainment. If he is at all worthy of his calling does he not at least hope to master some one subject? The mastery of any head of the law is no doubt a great ambition, but his choice of a profession has given him this ambition as his right, in exchange for what he sacrificed in the choice. Moreover he fairly pledged himself to it when he gave himself to teaching, for "the main secret of teaching law, as of all teaching, is what Socrates declared to be the secret of eloquence, understanding your subject."¹ Should he not then in due time make a record of what he has accomplished? Falling short of his full purpose he may at least make some contribution of permanent value to the law. This without more is a high privilege — why does he reject it?

It begins to look as if something were lacking in this young man. When he chose to become a teacher, and therefore a student, of the law, we were justified in hoping that he was a scholar. At least we had a right to expect of him a love of the law, a clear head, intellectual tastes and capacity, and an appetite for hard work. The suspicion that some of these things are missing is soon confirmed. We find that he "is making his speculations too easily"; "judges and lawyers hold his so-called theories" "in suspicion"; and his "speculations" are of such a kind that there is even an "actual demand" for their

¹ 9 HARV. L. REV. 175.

"curtailment."² Perhaps it was a tendency toward such easy "speculations" which turned him aside from the harder path of true scholarship. At any rate, the defect is likely to grow upon him unless he takes steps to cure it, and Mr. Kales's prescription seems excellently chosen. The need for it was serious. No mere tonic was called for, but radical and vital measures; for we presently learn that but for this relief he would, on reaching forty-five, have found life as a law teacher "empty and stupid." Whatever doubt this may suggest whether he chose his profession wisely to begin with, there can be none as to the wisdom of Mr. Kales's remedy.

Suppose now that the teacher is a scholar, or at least has the natural equipment which we have reasonably demanded of him. How will the case be then? Infinitely various, of course, according to the nature of the man; but some general truths can be stated.

In the first place, his spare time — the subject matter of the whole discussion — may not be so great a matter after all. It is not even conceivable that he could "not do anything at all except meet his classes." The mere preparation for his class-room work will itself be a large matter. He will constantly find that what came to him from his teachers, no matter how learned or skilful they were, cannot be made vital or helpful by him until he has passed it through his own mind, and seen it for himself, in his own way. How to present it most helpfully is a problem which will bear indefinite thought and show him indefinite opportunity to improve on himself if he only try hard enough. The constant discussion which he will encourage outside the class room with those fellow students of the law whom it is his privilege to teach will take up much time, but time well spent for him in clearing and ordering his thought. As has been truly said, teaching law if "fitly performed, calls for an amount of time, thought, and attention bestowed on the personal side of a man's relation to his students which instructors now can seldom give." And so the spare time is already contracting.

Such as it is, how will it best be occupied?

First and foremost comes the attempt to make himself a master of the subjects which he teaches. This is a vast enterprise, if rightly undertaken, and he is fortunate if in a lifetime he can complete the study and exposition of a single subject. If he can, other subjects will always supply him with more worlds than he has time to conquer. And so his spare time has already disappeared, and our problem with it. What remains is only an unending struggle to decide which of many things that call to be done shall be sacrificed to the next. Daily the teacher's thought, stimulated by the thought of his pupils, brings him on dark corners hitherto unexplored. Daily, as he seeks to bring light into these

² Lest my quotations may seem to misrepresent Mr. Kales's position, let me say that I do not clearly understand his use of the word "speculation." It seems to embody theories of the nature of law which cannot be discussed here; but it must be used in a very special sense indeed to justify the position that "the accepted ultimate function of the law teacher is to further this process of speculation." Whatever its meaning, it has unfortunate question-begging possibilities. It suggests at once an aloofness from realities and from practical considerations pointing to a poor common lawyer, and a neglect of careful and thorough investigation pointing to a poor student — thus doubly justifying the "suspicion" of "judges and lawyers." And at times its use even seems to endorse a study narrowed to the law of a single state rather than enriched by comparison of its development in different jurisdictions.

recesses, he finds them opening into unsuspected inner caverns, rich with material of endless fascination, but also of endless labor. The great advantage which belongs to the teacher of dealing with some head of the law as a whole carries with it the inevitable penalty that in so wide a field these problems, calling not for "speculation" but for scientific and painstaking investigation, will disclose themselves faster than they can be solved, and will lead him into more paths than he can follow. These paths will diverge widely according to the nature of the subjects with which he deals. They may lead into historical investigation of our own early law, the study of "the day before yesterday in order that yesterday may not paralyze to-day, and to-day may not paralyze to-morrow." Or perhaps he must scrutinize foreign systems for the light which comes from a comparison of them with his own. Or his work may call for an intimate knowledge of modern economic and financial conditions, and of the business and political movements of the present day. As these alluring opportunities for study present themselves and compete for his attention, two things at least are certain. There will be no occasion for "suspicion" or "curtailment" of the product of sound work rightly done; and the doer of it will run no risk of finding life "empty" or "stupid."

The subject of our discussion, the teacher's spare time, has long since vanished, but not so the demands upon it. There are the constantly increasing calls which come to him, as his authority in his subject becomes recognized, from other lawyers and from public officials. He will find himself yielding to these from a sense of public duty, or a desire of helpfulness, regardless of the sacrifice of his time. Often they will come from his former pupils, who are testing his "speculations" in the "laboratory" of the courts, and the habit of putting himself at their disposal will prove too strong to be resisted. There is his duty, which Mr. Kales does not overlook, to serve the cause of law reform, and anyone who has worked on Bar Association committees knows the infinite capacity of such work for the consumption of time. There are other public and civic duties, manifold and miscellaneous, which the community will not fail to bring to his attention. Amid all this he will greatly desire (whether he can find time to gratify the desire is another question) to keep abreast of the current decisions in English-speaking countries, and watch the live growth of the law in the wonderful and never-ending variety of facts. And before he has had a chance even to consider the claims of society and his family, the problem has resolved itself into the central tragedy of life — that there are only twenty-four hours in the day.

I do not mean to overlook the advantage that a teacher may derive from having practiced at some stage of his career. Mr. Kales justly emphasizes this. And he has done a valuable service in showing how a young man may take up teaching immediately after graduation and may yet not lose this advantage. But in a well-balanced faculty the work of the various members will differ as widely as the men, and it would be a mistake, by any undue emphasis on practice, to undervalue the great work of legal scholarship which is peculiarly the teacher's province. Even when the teacher appears in court to argue questions of law which have come to him as an expert in his own subject, it is none the less true that every hour given to advocacy is taken from study which may be made most valuable to him and to the law. Mr. Kales says that the number of great treatises produced by professors has disappointed some expectations. But why is this so? Only because time was lacking for

the work. Those who knew Mr. Ames and his colleagues of the last generation know well that their failure to produce more such treatises was due to nothing but their deliberate choice, amid conflicting demands on their time, to serve their pupils and the law in ways not less real because more self-effacing. To plant the seed from which the great treatises of another would grow gave them the same satisfaction as if the work were their own. In their case at least no one would regret the use they made of time which might have been given to advocacy. And the teachers of the next generation will be fortunate if the advantages which have come to them through the work of their predecessors will give them even a fair chance in a single lifetime for the adequate study and exposition of their subjects.

Ezra Ripley Thayer.

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CONSTITUTIONALITY OF MECHANICS' LIEN LAWS. — The statutes creating liens in favor of sub-contractors and material men are of two types. The first type gives an indirect lien, which depends upon, and is limited in amount to, the indebtedness of the owner to the contractor. The sub-contractor is subrogated to the rights of the original contractor, and the lien is a remedy for the enforcement of a debt.¹ The second type gives a lien directly to the sub-contractors and material men regardless of the state of accounts between the original parties, and it is to this type of statute that the most determined constitutional objections have been directed. It is well settled that such enactments do not impair the obligation of contract, as they do not apply to contracts already existing;² nor are they invalid as class legislation.³ The chief argument has been under the due process and similar clauses of the federal and state constitutions.

It is settled by the weight of authority that the ordinary statute, which gives a lien to sub-contractors for the value of their wares does not offend against the due process clause,⁴ even though the act be construed to allow liens which aggregate more in value than the contract

¹ See 2 JONES, LIENS, § 1286.

² Colpetzer v. Trinity Church, 24 Neb. 113, 37 N. W. 931.

³ Warren v. Sohn, 112 Ind. 213, 13 N. E. 863.

⁴ Smalley v. Gearing, 121 Mich. 190, 79 N. W. 1114; Laird v. Moonan, 32 Minn. 358, 20 N. W. 354; Mallory v. La Crosse Abattoir Co., 80 Wis. 170, 49 N. W. 1071. In the Wisconsin case the court appears to have regarded as of importance a proviso in the statute allowing the owner to recover from the contractor any sums expended in discharging liens. But he may do so without any statute on the ordinary principles of subrogation. Nichols v. Bucknam, 117 Mass. 488.

price.⁵ The reasoning by which this result is reached is, that the owner knows that the work and materials will be furnished by persons who must give the contractor credit; and he is held to have knowledge of the statute and to contract with reference thereto. Hence it is by his own will that any incumbrance exists.⁶ He is not compelled to pay twice, or for something he did not order, as he may defer payment till the time for filing liens has expired.⁷ Clearly there results a slight restriction on the liberty of contract, but judicial opinion is almost unanimous that this restriction is amply justified by the promotion of the public welfare. The unpaid sub-contractor is furnished a trustworthy security when he can rely for payment on the property whose value has been enhanced by his work and materials.⁸ As a further argument in favor of such statutes, it may be suggested that the creation of a direct lien in favor of a stranger and without consent of the owner is a conception by no means novel in our law.⁹

This reasoning sanctions the creation of a legal, but non-contractual, relation between the owner and sub-contractors, and gives the latter an independent right based solely on the statute.¹⁰ In accordance with this view, it is held by the weight of authority that a stipulation in the original contract between the owner and builder cannot deprive the sub-contractors of their lien.¹¹ The contrary doctrine, which is upheld in Pennsylvania, proceeds on the theory that the statute makes the contractor the agent of the owner to create a contractual relation between him and the sub-contractors, the original contract being, so to speak, the power of attorney for that purpose.¹² But it is submitted

⁵ *Henry & Coatsworth Co. v. Evans*, 97 Mo. 47, 10 S. W. 868; *Bardwell v. Mann*, 46 Minn. 285, 48 N. W. 1120. But see *Whittier & Fuller v. Wilbur*, 48 Cal. 175.

⁶ *Jones v. Great Southern Fireproof Hotel Co.*, 86 Fed. 370; *Blauvelt v. Woodworth*, 31 N. Y. 285; *Chicago Lumber Co. v. Newcomb*, 19 Colo. App. 265, 74 Pac. 786. "The foundation principle on which these statutes have been upheld in this and other jurisdictions is the consent and authority of the owner to charge his property, evidenced by his own contract made under and with reference to the provisions of the existing lien law." *Bardwell v. Mann*, 46 Minn. 285, 289, 48 N. W. 1120, 1122.

⁷ *Smith v. Newbaur*, 144 Ind. 95, 42 N. E. 40; *Henry & Coatsworth Co. v. Evans*, *supra*.

⁸ *Cole Mfg. Co. v. Falls*, 90 Tenn. 466, 16 S. W. 1045; *Jones v. Great Southern Fireproof Hotel Co.*, *supra*. "It does not take away or affect the rights of the owner any further than it may be necessary for the security of those who are presumed to have added something to the owner's property equal to the expense incurred." *Laird v. Moonan*, 32 Minn. 358, 361, 20 N. W. 354, 355. *Contra*, *Palmer & Crawford v. Tingle*, 55 Oh. St. 423, 45 N. E. 313. The statute considered in this case was the same as that which was subsequently held constitutional in the federal case *supra*.

⁹ *The Bee*, 3 Fed. Cas. No. 1,219 (salvage lien); *Bright v. Boyd*, 4 Fed. Cas. No. 1,875 (lien on land for improvements made by *bonâ fide* trespasser); *Singer Mfg. Co. v. London & S. W. Ry. Co.*, 1 Q. B. D. 833 (lien of carrier for goods shipped by a thief).

¹⁰ "The lien law of 1881 created a new relation between builders on the one hand, and mechanics, laborers, and material men, contributing skill, labor, and material to their building, on the other. But it is a relationship of law, not of contract." *Colpetzer v. Trinity Church*, 24 Neb. 113, 124, 37 N. W. 931, 936.

¹¹ *Whittier & Fuller v. Wilbur*, *supra*; *Norton v. Clark*, 85 Me. 357, 27 Atl. 252; *Stewart Contracting Co. v. Trenton & New Brunswick R. Co.*, 71 N. J. L. 568, 60 Atl. 405. See 19 Am. St. Rep. 699, note.

¹² *Schroeder v. Galland*, 134 Pa. St. 277, 19 Atl. 632. A recent statute of Pennsylvania provides that "if the legal effect of the contract between the owner and contractor is, that no claim shall be filed by anyone, such provision shall be binding." 1903 PA.

that this is not a sound interpretation of the statute. It amounts to this, that the statute compels the owner to assent to the creation of a lien, but that he may choose not to assent, and thus evade the statute by so stipulating in the original contract.

If the prevailing doctrine is sound, it would seem to follow that there could be no constitutional objection to a statute which provides in terms, that there shall be a lien in favor of sub-contractors, notwithstanding the original contract stipulate that no liens shall be filed.¹³ Yet in a recent case, the Supreme Court of Illinois declared such an act unconstitutional, as depriving the owner of his property, namely, liberty of contract, without due process of law.¹⁴ *Kelly v. Johnson*, 44 Chic. Leg. News 89 (Ill., Sup. Ct.).

DISCRIMINATION INVOLVED IN PREFERENTIAL RAILROAD RATES FOR SUBURBAN SERVICE. — A recent case raises the question of how far suburban railroad rates may be based upon considerations different from those applying to other traffic. As a railway company, by its other traffic, could still earn a profit of seven per cent on its total capitalization, through an advance in rates, it was held proper for the railroad commission to prohibit the advance within a ten-mile suburban zone and to restore therein previous rates so low that they barely covered the actual cost of the service. *Puget Sound Electric Ry. v. Railroad Commission*, 117 Pac. 739 (Wash.). That a large population had grown up, induced by and dependent upon rates unreasonably low would itself be no objection to an advance to reasonable rates.¹ But the court held the advanced rates to be unreasonable on the ground that the others were the only rates that those travelling daily to work in the city could afford to pay.² The public, however, should go without a particular service of which it cannot afford to pay the reasonable cost, which must always include a fair return upon the reasonable capitalization of the

LAWS, 279, PURD. DIG., 13 ed., 2489. *Glassport Lumber Co. v. Wolf*, 213 Pa. St. 407, 62 Atl. 1074.

¹³ *Contra*, *Waters v. Wolf*, 162 Pa. St. 153, 29 Atl. 646.

¹⁴ The court relied to some extent on a decision of the Supreme Court of Michigan. *The John Spry Lumber Co. v. Sault Savings Bank, Loan & Trust Co.*, 77 Mich. 199, 43 N. W. 778. But the statute considered in that case provided for a lien without any reference whatever to the original contract, and has been distinguished in a later Michigan case. *Smalley v. Gearing*, *supra*. It is well settled that the owner should not be burdened with a lien for materials and labor not contemplated by the original contract. *Siebrecht v. Hogan*, 99 Wis. 437, 75 N. W. 71; *Selma Sash, Door & Blind Factory v. Stoddard*, 116 Ala. 251, 22 So. 555.

¹ *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U. S. 433, 31 Sup. Ct. 288. See 24 HARV. L. REV. 581.

² *Puget Sound Electric Ry. v. Railroad Commission*, *supra*, 744, 745. See *Brunswick Water District v. Maine Water Co.*, 99 Me. 371, 59 Atl. 537. The court cites this case for the proposition that if rates cannot be reasonable to both company and customer they must be to the latter. But this doctrine is properly restricted to the peculiar circumstances attending the initial operation of public service through sparsely settled regions. *Coal & Coke Ry. Co. v. Conley*, 67 W. Va. 129, 67 S. E. 613. See *Southern Pacific Ry. Co. v. Bartine*, 170 Fed. 725, 767.

private property in use.³ Legislation fixing a rate which shifts the burden of earning its proportionate share of this return from a particular service to the other traffic has been held unreasonable under a state constitution.⁴ This was irrespective of the federal ruling that under the fourteenth amendment this is no confiscation of property so long as the railroad may still earn a fair return upon its entire business.⁵ The same amendment, it is submitted, may, however, be as effectually violated through a deprivation of liberty if a railroad is compelled to discriminate against a portion of the public.⁶ That the reason of the law condemns discrimination equally, whether it be absolute, under similar conditions, or relative, through a disproportion of difference in charge to difference in conditions, is already being recognized.⁷ Apparently the uncertainty and confusion remaining is chiefly over what is a sufficient dissimilarity.⁸ That it must be one affecting the cost of service is the truly fundamental principle indicated in federal court decisions.⁹ The Supreme Court, however, has held repeatedly that the relative prevalence of competition is a factor.¹⁰ Nevertheless the majority of state courts seem to hold that the interest of the railroad in sharing competitive business should yield to the law against all discrimination.¹¹ That fate may await another economic law of private business by which, as the principal case demonstrates,¹² it might be profitable to stimulate this additional suburban traffic at any charge covering actual cost, if it could be secured on no other terms.¹³ Already the duties of public service prohibit rate manipulation calculated to reward the large or exclusive shipper,¹⁴ to build up one community at the expense of another,¹⁵ or to favor certain industries in

³ Metropolitan Trust Co. v. Houston & Texas Central Ry. Co., 90 Fed. 683. See Missouri, K. & T. Ry. Co. v. Love, 177 Fed. 493, 501; 20 HARV. L. REV. 521, 523.

⁴ Morgan's L. & T. R. & S. S. Co. v. Railroad Commission, 127 La. 636, 53 So. 890. See 2 WYMAN, PUBLIC SERVICE CORPORATIONS, §§ 1064, 1202. Cf. Pennsylvania R. Co. v. Philadelphia County, 220 Pa. St. 100, 68 Atl. 676; San Diego Land & Town Co. v. National City, 74 Fed. 79. But cf. St. Louis & S. F. Ry. Co. v. Gill, 156 U. S. 649, 15 Sup. Ct. 484; Atlantic Coast Line R. Co. v. North Carolina, 206 U. S. 1, 27 Sup. Ct. 585.

⁵ Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 22 Sup. Ct. 900; Willcox v. Consolidated Gas Co., 212 U. S. 19, 29 Sup. Ct. 192.

⁶ Cf. Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 19 Sup. Ct. 565.

⁷ See Western Union Tel. Co. v. Call Pub. Co., 181 U. S. 92, 100, 21 Sup. Ct. 561, 564; Postal Cable Tel. Co. v. Cumberland Tel. & Tel. Co., 177 Fed. 726, 729; 2 WYMAN, PUBLIC SERVICE CORPORATIONS, § 1340; 20 HARV. L. REV. 521, 522; 23 HARV. L. REV. 648. The principal case ignores the existence of any restraint upon relative discrimination under dissimilar conditions. Puget Sound Electric Ry. v. Railroad Commission, *supra*, 739, 748.

⁸ See 20 HARV. L. REV. 521.

⁹ Pennsylvania R. v. International Coal Mining Co., 173 Fed. 1.

¹⁰ Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 20 Sup. Ct. 209; East Tennessee, etc. Ry. Co. v. Interstate Commerce Commission, 181 U. S. 1, 21 Sup. Ct. 516.

¹¹ Illinois Central R. Co. v. People, 121 Ill. 304, 12 N. E. 670; Louisville & N. R. Co. v. Commonwealth, 106 Ky. 633, 51 S. W. 164. See 2 WYMAN, PUBLIC SERVICE CORPORATIONS, § 1377.

¹² Puget Sound Electric Ry. v. Railroad Commission, *supra*, 747.

¹³ See 2 WYMAN, PUBLIC SERVICE CORPORATIONS, §§ 1077, 1370; 23 HARV. L. REV. 648.

¹⁴ Hays v. Pennsylvania Co., 12 Fed. 309; Western Union Tel. Co. v. Call Pub. Co., *supra*. *Contra*, Silkman v. Water Commissioners, 152 N. Y. 327, 46 N. E. 612.

¹⁵ State v. Adams Express Co., 171 Ind. 138, 85 N. E. 337; Galveston Chamber of Commerce v. Railroad Commission, 137 S. W. 737 (Tex. Civ. App.). At least this

anticipation of increased business in return.¹⁶ And, while properly allowing for differences in the cost of carrying articles of varying value,¹⁷ the public service law is coming more and more to condemn rates graduated according to what it is worth while to the patron to pay,¹⁸ or according to the purpose to which the identical service is to be put.¹⁹ Consequently, if this law is to develop consistently, it would seem that neither the sociological nor the economic advantages of encouraging suburban communities²⁰ should justify the accommodation of their peculiar necessities by any modification of rates not in proportion to some difference in the cost of service.²¹ However, although the railroad adopting such a policy may not at present be condemned by the law,²² yet the position seems to be clear that this is a discrimination against other localities and in favor of a particular class which should not be ordered by the state.²³

THE STATUS OF A STOCKHOLDER. — The doctrine that the assets of a corporation constitute a "trust fund" for the benefit of its creditors had its origin in a *dictum* of Judge Story,¹ and was adopted by a large majority of the American courts.² The doctrine was applied to two essentially different classes of cases. It led the courts to say that a corpo-

cannot be done "to an unreasonable degree." *Interstate Commerce Commission v. Louisville & N. R. Co.*, 118 Fed. 613. See *Union Pacific Ry. Co. v. Goodridge*, 149 U. S. 680, 690, 13 Sup. Ct. 970, 974.

¹⁶ *Hilton Lumber Co. v. Atlantic Coast Line R. Co.*, 136 N. C. 479, 48 S. E. 813; *Crescent Coal Co. v. Louisville & N. R. Co.*, 143 Ky. 73, 135 S. W. 768. *Contra*, *Hoover v. Pennsylvania R. Co.*, 156 Pa. St. 220, 27 Atl. 282.

¹⁷ *Interstate Commerce Commission v. Delaware, L. & W. Ry. Co.*, 64 Fed. 723.

¹⁸ *Tift v. Southern Ry. Co.*, 138 Fed. 753; *Philadelphia & R. Ry. Co. v. Interstate Commerce Commission*, 174 Fed. 687. See 2 WYMAN, PUBLIC SERVICE CORPORATIONS, §§ 1224, 1388; 23 HARV. L. REV. 648. But see *Interstate Commerce Commission v. Chicago, Great Western Ry. Co.*, 141 Fed. 1003, 1015.

¹⁹ *Baily v. Fayette Gas-Fuel Co.*, 193 Pa. St. 175, 44 Atl. 251; *Postal Cable Tel. Co. v. Cumberland Tel. & Tel. Co.*, 177 Fed. 726; *In the Matter of Restricted Rates*, 20 Interst. C. Rep. 426.

²⁰ *Cf. Chicago, R. I. & P. Ry. Co. v. Interstate Commerce Commission*, 171 Fed. 680. The federal court held that the commission should not regard the relative economic or commercial advantages of different localities in fixing rates. This was reversed by the Supreme Court, on the ground, however, that the commission had not in fact attempted to do so. 218 U. S. 88, 30 Sup. Ct. 651. See *Brewer v. Central of Georgia Ry. Co.*, 84 Fed. 258, 268. But *cf. Southern Ry. Co. v. Atlanta Stove Works*, 128 Ga. 207, 57 S. E. 429; *State v. Minneapolis & St. L. R. Co.*, 80 Minn. 191, 83 N. W. 60.

²¹ See 2 WYMAN, PUBLIC SERVICE CORPORATIONS, §§ 1395, 1396; 20 HARV. L. REV. 523.

²² See BEALE & WYMAN, RAILROAD RATE REGULATION, § 529.

²³ On this ground, the Interstate Commerce Commission held itself powerless to restrain the subsequent contraction of the zone within which commutation tickets were sold. *Sprigg v. B. & O. R. Co.*, 8 Interst. C. Rep. 443. *Cf. Galveston Chamber of Commerce v. Railroad Commission*, 137 S. W. 737, 745, 748 (Tex. Civ. App.); *Lake Shore & M. S. R. Co. v. Smith*, *supra*.

¹ *Wood v. Dummer*, 3 Mason (U. S.) 308.

² "Ever since the case of *Sawyer v. Hoag*, 7 Wall. 610, it has been the settled doctrine of this court that the capital stock of an insolvent corporation is a trust fund . . ." *Handley v. Stutz*, 139 U. S. 417, 427, 11 Sup. Ct. 530, 534. See 9 HARV. L. REV. 481.

ration could not prefer, in the payment of its obligations, those creditors who were also stockholders.³ It also furnished a reason why a corporation could not release subscribers to its capital stock after creditors had made advances relying thereon.⁴ It soon appeared, however, that the doctrine went too far. It was readily admitted that there was no trust in a strict sense,⁵ and that nothing was to be gained in using the phrase metaphorically.⁶ Failing the reason, the result in the first class of cases shifted until it became well settled that a corporation, as well as an individual, could prefer whatsoever creditor it pleased.⁷ But in the second class of cases the decisions remained uniform that a subscriber to the capital stock of a corporation could not be released from his obligation to pay the par value of his stock so as to defeat creditors. As these decisions could no longer be based on the indefinite theory of a "trust fund," the courts sought sufficient legal reasons on which to base their results. The Minnesota court⁸ maintained that the doctrine of "fraud upon creditors" would sustain the cases and held that a corporation could therefore release its subscribers so as to bar subsequent creditors. A recent California case held that the release of a subscriber who was, by statute,⁹ made absolutely liable for the debts of the corporation, prevented subsequent but not prior creditors from reaching him. *Thomas v. Wentworth Hotel Co.*, 117 Pac. 1041.

But such fraud alone will not explain the liability of a stockholder in all its phases, for many courts have held that the subscriber cannot plead the fraud of the corporation, by which he was induced to subscribe, when sued by a creditor.¹⁰ Of necessity, because of the nature of a corporation, the relation of stockholder and corporation is *sui generis*, and creates rights and liabilities that cannot be explained on ordinary legal principles.¹¹ Although the relationship may be created without any formalities by the mere consent of the parties, when once entered into, duties to third parties result from which the original parties are powerless to relieve themselves, and this relationship may thus be likened to a status. A subscriber's duty to pay for his stock is more than a mere duty to pay a debt. For he cannot set off against it so as to defeat creditors obligations due to him from the corporation,¹² and the Statute of Limitations does not begin to run in his favor until a "call" has been made by the corporation.¹³ Although the courts have frequently spoken of "representations made by the subscriber to the creditors,"¹⁴ a true

³ See 15 HARV. L. REV. 409.

⁴ Hawley v. Upton, 102 U. S. 314; Flinn v. Bagley, 7 Fed. 785. See 25 AM. L. REV. 940.

⁵ McDonald v. Williams, 174 U. S. 397, 19 Sup. Ct. 743.

⁶ Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 14 Sup. Ct. 127.

⁷ Gould v. Little Rock, etc. Ry. Co., 52 Fed. 680; New Hampshire Savings Bank v. Richey, 121 Fed. 956. See 3 NORTHWESTERN L. REV. 115, 206. The rule in England is the same. *In re Wincham Shipbuilding, Boiler & Salt Co.*, 9 Ch. D. 322.

⁸ Hospes v. Northwestern, etc. Co., 48 Minn. 174.

⁹ The statute was held constitutional in a previous case. *Thomas v. Wentworth Hotel Co.*, 158 Cal. 275, 110 Pac. 942.

¹⁰ See 24 HARV. L. REV. 147; 22 *id.* 58.

¹¹ See 34 AM. L. REG. N. S. 448.

¹² Sawyer v. Hoag, 17 Wall. (U. S.) 610.

¹³ Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. 739.

¹⁴ "The creditors had a right to rely upon the fact that the subscribers to such stock

estoppel cannot be spelled out; and yet if a creditor knows of facts which give the stockholder a defense against the corporation, he cannot hold the subscriber.¹⁵ As the capital stock is not a liability of the corporation,¹⁶ a release of a subscriber would be a gift that creditors could have set aside. But this does not explain the cases where the release was given for a consideration, for there the stockholder, as in the principal case, can still be held by prior creditors. Perhaps the truest explanation is that "the courts have been doing legislative work" with a "more or less systematic judicial recognition of a demand of the commercial world."¹⁷

PREScriptive RIGHT OF PUBLIC AND OF FREEHOLD INHABITANTS TO FISH IN PRIVATE WATERS. — Several interesting questions of prescription were settled in two recent cases in the House of Lords. *Johnston v. O'Neill*, [1911] A. C. 552; *Harris v. Earl of Chesterfield*, [1911] A. C. 623. In the first, four¹ of the seven lords held that a right to fish in private² waters cannot be acquired by the public by immemorial user. The decision of the majority is amply sustained by authority,³ though this is the first time the question has come before the House of Lords. A right of fishing in another's waters is a profit à *prendre*, a right to take a part of the produce of the land, as distinguished from an easement, which is a right without profit.⁴ A profit à *prendre* is incapable of creation except by grant or prescription.⁵ In the principal case there is no dominant estate to which a right by prescription could be attached,⁶ nor can a grant in gross be presumed, for the unorganized public is incapable of taking by grant.⁷ Thus the right, if any, must rest solely upon

have put into the treasury of the corporation, in some form, the amount represented by it." *Handley v. Stutz*, 139 U. S. 417, 430, 11 Sup. Ct. 530, 535.

¹⁵ *Coit v. Gold Amalgamating Co.*, 119 U. S. 343, 7 Sup. Ct. 231.

¹⁶ *Bridgman v. City of Keokuk*, 73 Ia. 42, 33 N. W. 355.

¹⁷ See 34 AM. L. REG. N. S. 448, 456.

¹ The Earl of Halsbury and Lords Macnaghten, Dunedin, and Robson. Lord Ashbourne, although not passing directly on the question, agreed with the majority, while Lord Shaw of Dunfermline intimated a contrary view. The Lord Chancellor dissented from the majority on the ground that the plaintiff had no title upon which to sue.

² An incidental question decided in the case is that a non-tidal lake of whatever size, even though actually navigable, does not belong as of right to the Crown. This follows the English rule as to rivers. See *Lord Leconfield v. Lord Lonsdale*, L. R. 5 C. P. 657, 665. But the rule as to large lakes had not previously been conclusively settled. See *Johnston v. O'Neill*, *supra*, 572. The rule here established is contrary to the general holding in the United States. *Percy Summer Club v. Astle*, 163 Fed. 1; *Sloan v. Biemiller*, 34 Oh. St. 492. But *cf. Adams v. Pease*, 2 Conn. 481. For a discussion of the opposite views, see 3 KENT COMM. 429, note *a*; 2 FARNHAM, WATERS AND WATER RIGHTS, § 368 *c*.

³ *Smith v. Andrews*, [1891] 2 Ch. 678; *Murphy v. Ryan*, Ir. R. 2 C. L. 143; *Albright v. Cortright*, 64 N. J. L. 330, 45 Atl. 634.

⁴ *Lloyd v. Jones*, 6 C. B. 81; *Peers v. Lucy*, 4 Mod. 362; *Cobb v. Davenport*, 33 N. J. L. 223.

⁵ *Grimstead v. Marlowe*, 4 T. R. 717; *Mellor v. Spateman*, 1 Saund. 340 *c*, note 3.

⁶ *Grimstead v. Marlowe*, *supra*; *Ordeway v. Orme*, 1 Bulstr. 183; *Merwin v. Wheeler*, 41 Conn. 14.

⁷ *Lloyd v. Jones*, *supra*; *Fowler v. Dale*, Cro. Eliz. 362; *Hill v. Lord*, 48 Me. 83.

custom, and although custom will support an easement,⁸ it has from early times been held incapable of supporting a profit *à prendre*.⁹

In the second case, a right of fishing was claimed by prescription on the basis of immemorial user by the freeholders in certain parishes along a navigable but non-tidal river. Here there were estates to which the right could be attached by prescription. But as the right claimed was a right to take fish without stint and for commercial purposes, four¹⁰ of the seven lords held that it could not be so acquired, for it was not necessary to the enjoyment of the dominant estates, nor was it reasonable, for the estates could be divided indefinitely and thus exhaust the servient estate; so there were no reasonable grounds for presuming a grant. This decision seems correct, for although the very point had not previously arisen, it had in general been held that a profit *à prendre* claimed as appurtenant to an estate must be reasonably limited to the needs of the estate in which such right was claimed to inhere.¹¹

Another interesting question in the last mentioned case, although raised in the pleadings, was not pressed in the argument, and so was not decided. This is whether the right of fishing, if claimed in gross, could have been sustained. The Lord Chancellor and Lord Ashbourne dissent from the holding of the majority on the ground that a right in gross should be found in the present case by prescription, while Lord Gorrell accords with the majority on the express ground that no right in gross is urged. The Lord Chancellor and Lord Ashbourne follow the case of *Goodman v. Mayor of Saltash*,¹² in which a grant to the free inhabitants of ancient tenements in a borough as a corporation, or a grant to a corporation for the use of the inhabitants, was presumed. The Saltash case can be supported, if at all, only on the ground of a charitable trust.¹³ The decision, it is submitted, was at least questionable,¹⁴ and in a later case¹⁵ Kay, J., refused to apply it to circumstances such that it was not reasonable to suppose there had at one time been a corporation to which the grant could have been made. Lord Gorrell intimates that *Harris v. Earl of Chesterfield*

⁸ *Race v. Ward*, 4 E. & B. 702; *Abbot v. Weekly*, 1 Levinz 176. It should be noted in this connection that in the United States some jurisdictions hold that no rights whatever can be established by custom, on the ground that there can be no immemorial user in America. *Harris v. Carson*, 7 Leigh (Va.) 632; *Young v. Collins*, 2 Browne (Pa.) 292.

⁹ *Attorney-General v. Mathias*, 4 Kay & J. 579; *Gateward's Case*, 6 Coke 59 b. *Contra*, *Mayor of Linn-Regis v. Taylor*, 3 Levinz 160. The reasons advanced are that such a right would be uncertain, unreasonable, as tending to destroy the subject matter to which the custom applied, and impolitic as establishing an unreleasable incumbrance upon land. Further, while an easement may originate by mere dedication to the public and acceptance by the public authorities, a profit *à prendre* cannot be acquired by such means. *Fitchburg R. Co. v. Page*, 131 Mass. 391; *Cobb v. Davenport*, 32 N. J. L. 369.

¹⁰ The Earl of Halsbury and Lords Gorrell, Macnaghten, and Kinnear. Lord Loreburn, L. C., accords in *dictum*.

¹¹ *Scholes v. Hargreaves*, 5 T. R. 46; *Heyward v. Cannington*, 1 Sid. 354; *Merwin v. Wheeler*, *supra*. See 2 BL. COMM. 265.

¹² 7 App. Cas. 633.

¹³ GRAY, THE RULE AGAINST PERPETUITIES, §§ 581-583.

¹⁴ *Rivers v. Adams*, 3 Ex. D. 361; *Weekly v. Wildman*, 1 Ld. Raym. 405; *Hill v. Lord*, *supra*. But cf. *Willingale v. Maitland*, L. R. 3 Eq. 103; *Chilton v. Corporation of London*, 7 Ch. D. 735.

¹⁵ *Tilbury v. Silva*, 45 Ch. D. 98.

embodies such circumstances. The view of the minority extends the Saltash case to prescription by freeholders of certain parishes and is thus harder to reconcile with authority than the case followed.¹⁶ It is to be regretted that the majority did not pass upon this question, and thus decide whether such unreleasable rights should be allowed to be further extended.¹⁷

ANCILLARY APPOINTMENT OF RECEIVERS IN FEDERAL COURTS. — A bill seeking the appointment of a chancery receiver must show a right to some distinct equitable relief.¹ Moreover the United States Supreme Court early decided that a receiver had no power outside of the jurisdiction in which he was appointed.² Under this doctrine, the receiver must obtain some appointment from the courts in the other jurisdictions where he wishes to sue.³ A recent case decided that a receiver already appointed in one federal jurisdiction was not properly appointed "ancillary"⁴ receiver in another federal jurisdiction after an *ex parte*⁵ hearing of a bill which merely asked for confirmation of his appointment in the original jurisdiction and showed no right to distinct equitable relief. *Fairview Fluor Spar and Lead Co. v. Ulrich*,⁶ 44 Chic. Leg. News 81 (C. C. A., Seventh Circ.).

The reason why a receiver has no extra-territorial power is because he has no title to the assets or property,⁷ but is merely invested by the court of his appointment with the power of gathering them in, and this investiture of power need not be recognized in other jurisdictions.⁸ On the other hand, as a practical matter, foreign receivers are allowed to sue in most of the state courts,⁹ and some federal courts, though admitting the general rule laid down by the Supreme Court, allow foreign receivers to sue as a so-called matter of comity.¹⁰ Comity in this connection

¹⁶ *Bland v. Lipscombe*, 4 E. & B. 713 n. c.; *Whittier v. Stockman*, 2 Bulstr. 86.

¹⁷ See GRAY, THE RULE AGAINST PERPETUITIES, § 579.

¹ See 3 STREET, FEDERAL EQUITY PRACTICE, § 2541. So a bill that asks only for the appointment of a receiver will not be entertained. *Greene v. Star Cash & Package Car Co.*, 99 Fed. 656.

² *Booth v. Clark*, 17 How. (U. S.) 322; *Great Western Mining & Mfg. Co. v. Harris*, 198 U. S. 561, 25 Sup. Ct. 770. See *Hale v. Allinson*, 188 U. S. 56, 68, 23 Sup. Ct. 244, 249.

³ *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, 69 Fed. 871. See HIGH, RECEIVERS, § 47; 3 STREET, FEDERAL EQUITY PRACTICE, § 2692.

⁴ It is not technically an "ancillary" bill. *Coltrane v. Templeton*, 106 Fed. 370.

⁵ A receiver may be appointed *ex parte* under certain special circumstances. See 3 STREET, FEDERAL EQUITY PRACTICE, § 2551.

⁶ *Accord*, *Mercantile Trust Co. v. Kanawha & Ohio Ry. Co.*, 39 Fed. 337; *In re Brant*, 96 Fed. 257. *Contra*, *Platt v. Philadelphia & Reading R. Co.*, 54 Fed. 569. See *Greene v. Star Cash & Package Car Co.*, *supra*.

⁷ A receiver that has title either by statute or assignment may sue of right in a foreign jurisdiction. *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739; *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888.

⁸ See ALDERSON, RECEIVERS, § 28.

⁹ *Bank v. McLeod*, 38 Oh. St. 174; *Metzner v. Bauer*, 98 Ind. 425; *Runk v. St. John*, 29 Barb. (N. Y.) 585. See HIGH, RECEIVERS, § 47.

¹⁰ *Rogers v. Riley*, 80 Fed. 759; *Kirtley v. Holmes*, 107 Fed. 1; *Lewis v. Clark*, 129 Fed. 570. See *Chandler v. Siddle*, 3 Dill. (U. S.) 477, 479. *Contra*, *Fowler v. Osgood*, 141 Fed. 20; *Hilliker v. Hale*, 117 Fed. 220.

resolves itself into the proposition that where the rights of creditors in the jurisdiction, or the public policy of the jurisdiction, are not involved, a foreign receiver will be allowed to sue.¹¹ The other alternative is, of course, for the foreign receiver to obtain a so-called "ancillary" appointment which gives the "ancillary" jurisdiction control over the receiver and so protects the rights of its citizens.¹² But where the rights of domestic creditors are not involved, it seems desirable to allow a foreign receiver to sue without further appointment, as is done by many courts.¹³

If, however, the rights of domestic creditors are involved, which does not clearly appear in the principal case, it is submitted that these creditors would be amply protected whether the method by which the court obtained control over the receiver was by an original bill, or by a bill, as in the principal case, that prayed for no distinct equitable relief, but merely for the confirmation of the receivership. The argument against this less technical and cumbersome mode of procedure is that since a receiver has no extra-territorial power, each jurisdiction has the right to take the matter under consideration *de novo*, decide whether the case is a proper one for a receiver, and appoint as receiver the person whom the court considers best fitted;¹⁴ that, therefore, when the original receiver is also appointed in the ancillary jurisdiction, it only occurs as a matter of comity or pure coincidence. This theory is unassailable. But as a practical matter, the decree in the original court is usually accepted as sufficient evidence that there is a proper case for a receiver;¹⁵ the original receiver is appointed in the "ancillary" jurisdiction;¹⁶ and the original jurisdiction has final charge of the assets.¹⁷ In fact any other practice would be intolerable, and to a large degree defeat the objects of a receivership where property is in several jurisdictions.

A case like the principal case will probably seldom arise again.¹⁸ But this extreme assertion of independent jurisdiction seems unfortunate, particularly among federal courts, and ought to be remedied by statute.

LEGALITY OF INSURANCE AGAINST SUICIDE. — Does public policy make illegal a contract insuring against suicide of the insured while sane? The objection to such a contract, upon the ground of public policy,¹ is analo-

¹¹ Rogers v. Riley, *supra*.

¹² ALDERSON, RECEIVERS, § 28.

¹³ See 3 STREET, FEDERAL EQUITY PRACTICE, § 2670; 18 HARV. L. REV. 520.

¹⁴ Mercantile Trust Co. v. Kanawha & Ohio Ry. Co., *supra*. See ALDERSON, RECEIVERS, § 29.

¹⁵ See 3 STREET, FEDERAL EQUITY PRACTICE, § 2696.

¹⁶ See 3 STREET, FEDERAL EQUITY PRACTICE, § 2697.

¹⁷ See Conklin v. United States Shipbuilding Co., 123 Fed. 913, 916, 917; Farmers' Loan & Trust Co. v. Northern Pac. R. Co., 72 Fed. 26; HIGH, RECEIVERS, § 375 *a*.

¹⁸ Attorneys will, out of abundant caution, label their bills in other than the original jurisdiction "original," and will set out all the facts for distinct equitable relief. See 18 HARV. L. REV. 520.

¹ It has been suggested that in the absence of express provision suicide is not one of the perils insured against. See Ritter v. Mutual Life Ins. Co., 169 U. S. 139, 152, 18 Sup. Ct. 300, 304. The great weight of authority holds the contrary. See Campbell v. Supreme Conclave Heptasophs, 66 N. J. L. 274, 278-281, 49 Atl. 550, 551-552.

gous to the basis of the doctrine of insurable interest, the temptation which the contract would offer to the insured to destroy life. The distinction between the two, that the insured in one case would be tempted to enrich another by destroying himself, and in the second to enrich himself by destroying another, only shows that temptation of the former kind is comparatively weak. Yet the mere fact that a contract of insurance tends to induce the insured to destroy the subject of the insurance does not make the contract contrary to public policy, for every insurance contract holds out some such inducement. It is the average effectiveness of such a temptation in any particular class of such contracts that must determine whether they are opposed to public policy.

The difficulty of determining this in the case of insurance against suicide explains the conflict of authority on that point.² Most of the cases have allowed recovery. It has been suggested³ that the opposed decisions can be reconciled on the ground that in the leading case denying the validity of insurance against suicide the policy was made payable to the insured and his representatives,⁴ and that in almost all the cases that have held the contrary the beneficiary was some other person.⁵ This is logically unsound. From the viewpoint of the suggested rule of public policy such a distinction must be put on the ground that in the former class of contracts there is greater temptation to commit suicide than in the other. The temptation involved is the desire of the insured to enrich the person who will get the substantial benefit resulting from payment by the insurer. To say the least, there is nothing to show that the insured is less desirous of enriching one whom he has specifically named as beneficiary than the unspecified persons who will ultimately be paid the proceeds of a policy made payable to the estate of the insured.

The desirability of the rule of public policy under discussion is no clearer upon analogy than upon authority and principle. The decisions are almost evenly divided upon the questions whether the life can validly be insured against death by execution for crime,⁶ or death as the result of participation in a criminal act.⁷ The solution of the problem would seem, therefore, to lie in legislative enactment. But the statutes themselves seemed to express the opposing views of the courts. Some statutes

² This discussion does not deal with cases where the insured intended suicide when the policy was issued. In such cases recovery is denied on the ground of fraud. *Smith v. National Benefit Society*, 123 N. Y. 85, 25 N. E. 197; *Parker v. Des Moines Life Association*, 108 Ia. 117, 78 N. W. 826.

³ See *Patterson v. Natural Premium Mutual Life Ins. Co.*, 100 Wis. 118, 124, 75 N. W. 980, 982.

⁴ *Ritter v. Mutual Life Ins. Co.*, *supra*. The opinion in this case gives other grounds for not allowing recovery. In *Moore v. Woolsey*, 4 E. & B. 243, the insured, to whom the policy was made payable, assigned; recovery was allowed. The assignment should not be regarded as material; if public policy made the contract void, assignment would not legalize it.

⁵ *Patterson v. Natural Premium Mutual Life Ins. Co.*, *supra*; *Campbell v. Supreme Conclave Heptasophs*, *supra*. *Contra*, *Hopkins v. Northwestern Life Assurance Co.*, 94 Fed. 729.

⁶ For recovery: *Collins v. Metropolitan Life Ins. Co.*, 232 Ill. 37, 83 N. E. 542. *Contra*, *Amicable Society v. Bolland*, 4 Bligh N. S. 194.

⁷ For recovery: *Sun Life Ins. Co. v. Taylor*, 108 Ky. 408, 56 S. W. 668. *Contra*, *Hatch v. Mutual Life Ins. Co.*, 120 Mass. 550.

prohibit the insurer's setting up the defense of suicide.⁸ A Georgia statute, expressly giving the insurer this defense,⁹ was a possible legislative declaration in favor of the disputed rule of public policy. A recent decision removed this possibility by holding that the statute did not prevent waiver of the defense by the insurer. *Mutual Life Ins. Co. v. Durden*, 72 S. E. 295 (Ga., Ct. App.). The case is thus an important addition to the already large preponderance of authority against the invalidation, on grounds of public policy, of contracts insuring the life against suicide while sane.

RECENT CASES.

ADVERSE POSSESSION — AGAINST WHOM TITLE MAY BE GAINED — EFFECT OF GRANTOR'S REMAINING IN POSSESSION. — The plaintiff conveyed his land to the defendant, intending that the latter should afterwards reconvey it to him. The plaintiff made improvements on the land, and seven years after the conveyance to the defendant he demanded a reconveyance, but was given merely a life lease. Thereafter he treated the land as his own property. His occupancy, including the period before the granting of the life lease, exceeded the period of the Statute of Limitations. *Held*, that he has acquired title in fee. *Freemon v. Funk*, 117 Pac. 1024 (Kan.).

It is well settled that a life tenant cannot acquire title by adverse possession against the reversioner or remainderman, since the latter has no right of action during the continuance of the life estate. See *Pinckney v. Burrage*, 31 N. J. L. 21; *Rohn v. Harris*, 130 Ill. 525, 22 N. E. 587. This rule does not apply where the remainderman is given a right of action by statute. *Garrett v. Olford*, 132 N. W. 379 (Ia.). The principal case ignores the grant of the life estate and treats the relation of the parties as that of grantor and grantee. Some courts appear to recognize no distinction between such a case and the ordinary situation, where the parties are strangers. *Smith v. Montes*, 11 Tex. 24; *Knight v. Knight*, 178 Ill. 553, 53 N. E. 306. By the weight of authority, however, the possession of a grantor is presumed to be subject to the rights of his grantee. *Buckholder v. Sigler*, 7 Watts & S. (Pa.) 154; *Schwallback v. Chicago, etc. Ry. Co.*, 69 Wis. 292, 34 N. W. 128. In order that this presumption be rebutted, most courts hold that a clear assertion of adverse right must be brought home to the grantee. *Dolson v. Atchison, etc. Ry. Co.*, 81 Kan. 816, 106 Pac. 1045. *Cf. Zeller's Lessee v. Eckert*, 4 How. (U. S.) 289. Other courts are more ready to find that the possession is adverse. *Waltemeyer v. Baughman*, 63 Md. 200. See *Brinkman v. Jones*, 44 Wis. 498, 524. In the principal case, the grantor, during the first seven years of the occupancy relied on by him, appears to have claimed only a right of reconveyance rather than a right of present ownership.

BANKRUPTCY — DISCHARGE — DISPUTED CLAIMS. — The petitioner was adjudicated a bankrupt in voluntary proceedings. The only debts scheduled were stated in his schedules to be disputed. *Held*, that the petitioner is not entitled to a discharge. *Matter of Gulick*, 26 Am. B. Rep. 632 (Dist. Ct., S. D. N. Y.).

Disputed claims are debts whose existence is as yet undetermined and whose existence the alleged debtor denies. If they do actually exist, they will be

⁸ MO. REV. STAT., 1909, § 6945; N. D. CIV. CODE, 1905, § 6064.

⁹ GA. CODE, 1911, § 2500.

released by a discharge in bankruptcy, for there is nothing in the Act excepting debts whose existence the debtor has denied from the operation of a discharge. BANKRUPTCY ACT OF 1898, § 17 *a*. There is therefore no basis for the statement in the opinion of the principal case that the Act does not authorize the discharge of disputed claims. Nor can the decision well be supported on the ground of lack of jurisdiction for the adjudication. The actual existence of debts is a fact necessary to found jurisdiction. BANKRUPTCY ACT OF 1898, § 4 *a*. See 3 REMINGTON, BANKRUPTCY, § 41. But the adjudication is based on the petition. See BANKRUPTCY ACT OF 1898, § 18 *g*. That no debts exist does not appear from the petition. Nor do the creditors offer to prove that no debts exist. Furthermore, it is doubtful whether an adjudication even in voluntary proceedings can be attacked on an application for a discharge. *In re Mason*, 99 Fed. 256. But see *In re Wheeler*, 165 Fed. 188.

BANKRUPTCY — PROPERTY PASSING TO TRUSTEE — FUTURE CONTINGENT INTEREST IN LIFE INSURANCE POLICY. — An insurance policy provided for payment of a certain sum to the bankrupt's wife on his death but gave him the option to surrender the policy for cash at the end of twenty years, if he was then living. § 70 *a* (5) of the Bankruptcy Act of 1898 provides that "property which . . . [the bankrupt] could by any means have transferred" shall pass to the trustee. *Held*, that the bankrupt's option to surrender the policy is not within this section. *In re Schaefer*, 189 Fed. 187 (Dist. Ct., N. D. Ohio, W. D.).

If, as the court is willing to assume, the insured will have the right to surrender the policy without his wife's consent, this case, in holding the right not assignable, is opposed to all other decisions on such policies. *In re Welling*, 113 Fed. 189; *Matter of Phelps*, 15 Am. B. Rep. 170; *In re Hetting*, 175 Fed. 65. It is supported only by a dissenting opinion. See *In re Welling*, 113 Fed. 189, 195. By its doctrine the policy is apparently regarded as a *res* in which the wife has the vested interest, and the insured a mere inalienable expectancy. But the limitations as to assigning future contingent interests in tangible property are not here involved. Rights under an insurance policy are choses in action. The insurer has contracted that the insured may, if he live twenty years, surrender the policy for cash. The insured thus has a right under an existing contract. The fact that nothing is to be paid under this contract right until a time in the future, and that the payment is subject to a contingency, affects the present value of the right, but cannot affect its assignability. See *In re Coleman*, 136 Fed. 818, 819; *Bassett v. Parsons*, 140 Mass. 169, 170, 3 N. E. 547.

BILLS AND NOTES — OVERDUE PAPER — EFFECT OF MATURITY OF SOME OF A SERIES OF NOTES GIVEN IN ONE TRANSACTION. — The defendant gave nine promissory notes in payment for a press, each reciting that it was secured by a certain chattel mortgage of even date. The payee transferred the notes and mortgage to the plaintiff for value after five of the notes were overdue. The defendant interposed a counterclaim for breach of warranty by the payee. *Held*, that this claim is valid against all of the notes. *Rowe v. Scott*, 132 N. W. 695 (S. D.).

The effect of maturity on a negotiable instrument is not to make it unassignable at law. The creation by transfer of a new legal title better than that of the transferor is prevented. *Down v. Halling*, 4 B. & C. 330; *Northampton National Bank v. Kidder*, 106 N. Y. 221. But the transferor's legal title passes, and maturity acts as notice of the equities to which it is subject. See *Fisher v. Leland*, 4 Cush. (Mass.) 456. Usually bad faith in the purchaser is essential to such notice. *Murray v. Lardner*, 2 Wall. (U. S.) 110. But in the case of a defect in the instrument so apparent as maturity, this requirement is dispensed

with. See *Angle v. North-Western Mutual Life Ins. Co.*, 92 U. S. 330, 341. If it is apparent that the notes were given in one transaction for one consideration, the notice given by the overdue notes is as effective for the others as for themselves. *Harrington v. Clafin & Co.*, 91 Tex. 294, 42 S. W. 1055; *Old National Bank of Fort Wayne v. Marcy*, 79 Ark. 149, 95 S. W. 145. But the fact that all the notes are secured by one mortgage is not in itself enough to make this apparent. *Boss v. Hewitt*, 15 Wis. 260; *Bank of Edgefield v. Farmers' Co-operative Mfg. Co.*, 52 Fed. 98. The conclusion of the court that the notes disclosed themselves to be parts of the same transaction is perhaps justified by the similar date of all the notes.

CARRIERS — LIENS — RIGHT OF CARRIER TO HOLD DAMAGED GOODS FOR NON-PAYMENT OF FREIGHT. — Goods were damaged in transit through the fault of the carrier to an amount greater than the freight charges. The carrier refused to deliver them unless the usual freight charges were paid. The consignee, who was also consignor, then sued the carrier *ex contractu* for the value of the goods. *Held*, that he cannot recover. *Wilensky v. Central of Georgia Ry. Co.*, 72 S. E. 418 (Ga., Sup. Ct.).

Because of a liberal procedure, the weight of American authority allows the consignee to defend a suit for freight by showing that the damage to the goods through the fault of the carrier equals or exceeds the charges. *Leech v. Baldwin*, 5 Watts (Pa.) 446. *Contra*, *Shields v. Davis*, 6 Taunt. 65. Moreover, the consignee may bring replevin or trover when the carrier refuses, on the ground of non-payment of freight, to deliver goods so damaged. *Moran Brothers Co. v. Northern Pacific R. Co.*, 19 Wash. 266, 53 Pac. 49, 1101; *Missouri Pacific Ry. Co. v. Peru-Van Zandt Implement Co.*, 73 Kan. 295, 85 Pac. 408, 87 Pac. 80. See 20 HARV. L. REV. 146. When the amount of damage does not equal the freight charges, the carrier has a lien for the balance only. *Bancroft v. Peters*, 4 Mich. 619. The reasoning is that if the carrier is liable for damage equal to the freight, there is no debt; and where there is no debt there is no lien. *Ewart v. Kerr*, 1 Rice (S. C.) 203. But the principal case is an action *ex contractu*. The carrier has undertaken, to the plaintiff as consignor, to transport and deliver the goods, on payment of proper charges, to the consignee. Unless he permits the consignee to take them without advancing illegal claims, the undertaking is not fulfilled. It is submitted that for this breach the carrier should be liable in contract for the damage actually incurred.

CARRIERS — LOSS OR INJURY TO GOODS — RESPONSIBILITY OF CARRIER FOR ANIMALS IN PENS UNDER STATUTORY REQUIREMENT. — A federal statute provided that on an interstate shipment no railroad should confine animals in cars longer than twenty-eight consecutive hours, without removing them for five hours into properly equipped pens for rest, water, and feeding, unless prevented by storm or other unavoidable causes. The plaintiff's sheep, while in the defendant carrier's stockyards, in transit, were killed. *Held*, that the defendant is not liable in the absence of negligence. *Beckman v. Southern Pacific Co.*, 118 Pac. 118 (Utah).

The law is settled that the transportation of animals is common carriage. *Swiney v. American Express Co.*, 115 N. W. 212 (Ia.). The carrier is bound to feed and care for the animals in transit. *Toledo, Wabash & Western Ry. Co. v. Hamilton*, 76 Ill. 393. While they are being carried, and until the undertaking is completed, he is an insurer, although the animals are in stockyards or pens. *Texas & Pacific Ry. Co. v. Turner*, 37 S. W. 643 (Tex.). See *Nelson v. Chicago, etc. Ry. Co.*, 78 Neb. 57, 59, 110 N. W. 741, 742. The ground of the decision in the principal case can be supported only on the reasoning that the statute relieves the carrier of his common-law liability while the cattle are in the pens. But the statute merely requires unloading at stated intervals, unless

the unloading is prevented by unavoidable causes. A statute changing the common law modifies it no further than the clear import of its language necessarily implies. *Johnson v. Southern Pacific Co.*, 117 Fed. 462. The decisions under this statute give no indication of relieving the carrier of his common-law liability, and uniformly consider its only purpose to be the prevention of cruel treatment of animals in interstate shipments. See *Chesapeake & Ohio Ry. Co. v. American Exchange Bank*, 92 Va. 495, 502, 23 S. E. 935, 937. *United States v. St. Louis, I. M. & S. Ry. Co.*, 177 Fed. 205. The liability of the carrier in transportation is still left as at common law. See *Missouri Pacific Ry. Co. v. Ivy*, 79 Tex. 444, 446, 15 S. W. 692, 693. The court seems to go beyond legitimate bounds in an attempt to cut down the carrier's common-law liability.

CARRIERS — PERSONAL INJURIES TO PASSENGERS — CONTAGIOUS DISEASE OF FELLOW PASSENGER. — The plaintiff sued as administrator for the death of his intestate, alleged to have been caused by contagious disease contracted from a fellow passenger of the intestate on the defendant's railroad. The defendant's conductor had no knowledge of the disease of the fellow passenger. *Held*, that the plaintiff cannot recover. *Bogard's Admr. v. Illinois Central R. Co.*, 139 S. W. 855 (Ky.).

A carrier is under a duty to use the highest care to provide safe conveyances, and is liable for injuries to passengers resulting from defects which might have been discovered by the use of such care. *Palmer v. President, etc. of Delaware & Hudson Canal Co.*, 120 N. Y. 170, 24 N. E. 302; *International & Great Northern Ry. Co. v. Anthony*, 24 Tex. Civ. App. 9, 57 S. W. 897. A carrier is under a duty to use the highest care to protect passengers from foreseeable injuries by their fellow passengers. *Kuhlen v. Boston & Northern Street Ry. Co.*, 193 Mass. 341, 79 N. E. 815. It would not be practicable to extend the duty of inspection of conveyances to inspection of passengers. *Cf. Gulf, Colorado & Santa Fé Ry. Co. v. Shields*, 9 Tex. Civ. App. 652, 29 S. W. 652. But the duty of the carrier would seem to require the conductor to take precautions when a reasonably prudent man would be so impelled by the facts under his observation. *Cf. Houston & T. C. R. Co. v. Phillio*, 67 S. W. 915 (Tex.). Under this view the decision in the principal case may be questioned. But *cf. Long v. Chicago, Kansas & Western R. Co.*, 48 Kan. 28, 28 Pac. 977.

CONSPIRACY — CRIMINAL LIABILITY — EFFECT OF GRANTING NEW TRIAL TO ONE DEFENDANT. — A new trial was granted one of several defendants indicted for conspiracy, on errors in no way prejudicial to the others, one of whom appealed. *Held*, that the verdict should stand as to the appellant. *Dufour v. United States*, 39 Wash. L. R. 714 (D. C., Ct. App.).

This case follows a recent American decision. *Browne v. United States*, 145 Fed. 1. But it is opposed to the weight of authority. *Queen v. Gompertz*, 9 Q. B. N. S. 824; *Isaacs v. State*, 48 Miss. 234. There seems to be no reason on principle why a new trial should not be given to one conspirator and refused to another, if it is certain that the error affected only the first. As a practical matter it usually will affect both, but by no means necessarily. There is, of course, no repugnancy in acquitting some and convicting others of those jointly indicted for conspiracy. *Jones v. Commonwealth*, 31 Grat. (Va.) 836.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — INHERITANCE TAX ON DEPOSITED PROPERTY COLLECTED THROUGH SAFE DEPOSIT COMPANY. — A statute provided that a safe deposit company on the death of a depositor should give the proper state officials ten days' notice before delivering over the property deposited to the legal representatives of the deceased and should retain a sufficient amount thereof to pay an inheritance tax on such property or be

liable to a penalty. *Held*, that the provision is not unconstitutional. *National Safe Deposit Co. v. Stead*, 95 N. E. 973 (Ill.):

The statute was objected to as impairing the obligation of the company's charter, as depriving it of liberty and property without due process of law, as subjecting the property to unreasonable searches and seizures, and as devoting the property, by delaying its delivery, to a public use without just compensation. On the death of the depositor the company would seem to hold the property as a bailee for the state and other parties entitled, as tenants in common, since an inheritance tax statute vests a property right in the state at the death of the decedent. *In re Estate of Graves*, 242 Ill. 212, 89 N. E. 978; *Estate of Stanford*, 126 Cal. 112. The view taken by the court, therefore, that the effect of the statute was merely to require a bailee to give notice to a part owner to be present at the distribution of the bailed property and to deliver to such owner his proportionate share, would seem to be justifiable, and renders all the objections taken invalid. The case is but an instance of the right of the state in certain cases for convenience and greater certainty to collect a tax by indirection through a third party. *Commonwealth v. D. & H. Canal Co.*, 150 Pa. St. 245, 24 Atl. 599. See *Monticello Distilling Co. v. Mayor, etc. of Baltimore*, 90 Md. 416, 427, 45 Atl. 210, 212.

CONTRACTS — SUITS BY THIRD PERSONS NOT PARTIES TO CONTRACT — CONTRACT WITH CITY TO ANSWER FOR DAMAGES TO PROPERTY OWNERS. — Property abutting on the route of a subway was damaged because of the improper methods of construction employed by a sub-contractor. The original contractor had contracted with the city to be answerable for such damages. *Held*, that the city is not, and the original contractor is, liable in damages to the owner of the abutting property. *Smyth v. City of New York*, 203 N. Y. 106.

This case extends somewhat the doctrine of *Lawrence v. Fox*, 20 N. Y. 268. Hitherto, in New York, the beneficiary could, in general, sue upon the contract only when he was owed some duty by the promisee. *Durnherr v. Rau*, 135 N. Y. 219. An exception was made when the defendant had violated the terms of its public franchise. *Pond v. New Rochelle Water Co.*, 183 N. Y. 330. Also the beneficiary might sue if the defendant had been negligent while performing a contract to fulfil a function of the state. *Robinson v. Chamberlain*, 34 N. Y. 389. In these cases there could have been a recovery apart from the contract, either on the public service law, or for personal negligence. In the principal case there was no liability except upon the contract. A majority of the jurisdictions in this country follow *Lawrence v. Fox*, but of these, only New York and Minnesota deny recovery to a "sole beneficiary." *Durnherr v. Rau*, *supra*; *Jefferson v. Asch*, 53 Minn. 446. Courts allowing recovery by the "sole beneficiary" attain the correct result, but as the doctrine of permitting the third party to sue at law upon such a contract is wrong in principle, the conclusion is reached in an improper way. See 15 HARV. L. REV. 767, 772-775, 780-785.

CONTRACTS — SUITS BY THIRD PERSONS NOT PARTIES TO CONTRACT — SUIT IN EQUITY BY CREDITOR OF PROMISEE. — A. conveyed assets to B. in return for B.'s promise to pay the debts of A. B. conveyed the same assets to C. in return for C.'s promise to pay the same debts. *Held*, that a creditor of A. can recover from C. in equity. *Forbes v. Thorpe*, 95 N. E. 955 (Mass.).

In Massachusetts a creditor cannot sue at law on a contract made for his benefit by the debtor. *Morril v. Lane*, 136 Mass. 93; *Borden v. Boardman*, 157 Mass. 410, 32 N. E. 469. So rigidly has this rule been observed, that of all the American jurisdictions, including those which ordinarily deny the creditor a right of action, Massachusetts alone refuses to allow a mortgagee to proceed against a grantee who has assumed the mortgage debt. *Mellen v. Whipple*,

1 Gray (Mass.) 317; *Keller v. Ashford*, 133 U. S. 610. See *Woodcock v. Bostic*, 118 N. C. 822, 828, 24 S. E. 362, 363. Although the actual decisions go only so far as to hold that the mortgagee has no right at law, there have been judicial utterances which seem to indicate that no action would lie even in equity. See *Rice v. Sanders*, 152 Mass. 108, 113. *A fortiori*, in the ordinary case, it would seem, equity would not act. The present case, therefore, in recognizing and assigning as one ground of the decision a right in the creditor to enforce in equity the promisee's right to compel performance by the defendant of the agreement made for the creditor's benefit, apparently marks a decided change in the attitude of this court. The change is all the more welcome since it places the law pertaining to this subject on a basis which is theoretically justifiable. See 15 HARV. L. REV. 767, 775 *et seq.*

CORPORATIONS — STOCKHOLDERS: INDIVIDUAL LIABILITY TO CORPORATION AND CREDITORS — RELEASE OF SUBSCRIBER TO CAPITAL STOCK. — Under a statute providing for the absolute liability of stockholders for the debts incurred by a corporation, while they were stockholders, a corporation released certain subscribers to its capital stock and later incurred a debt. *Held*, that the creditor cannot reach these subscribers. *Thomas v. Wentworth Hotel Co.*, 117 Pac. 1041 (Cal.). See NOTES, p. 278.

CORPORATIONS — STOCKHOLDERS: POWERS OF MAJORITY — VALIDITY OF ELECTION AFTER QUORUM BROKEN BY WITHDRAWAL OF STOCKHOLDERS. — After the annual meeting of the stockholders of a corporation had been duly organized, some stockholders without justification withdrew to break the quorum. Those remaining elected the defendants to office. *Held*, that the election is valid. *Commonwealth ex rel. Sheip v. Vandegrift*, 81 Atl. 153 (Pa.).

When stockholders withdraw from a regularly organized meeting, and organize another meeting for the election of officers, the election is invalid, even though a majority of the stock is represented. *Commonwealth ex rel. Langdon v. Patterson*, 158 Pa. St. 476, 27 Atl. 998. But see *In re Cedar Grove Cemetery Co.*, 61 N. J. L. 422, 39 Atl. 1024. But the question in the principal case is as to the validity of the proceedings of the remaining minority in the original meeting. A quorum is necessary to the legal organization of a meeting; but when the meeting is organized, in the absence of statutory requirement, a majority of the votes cast will elect. See *In re Argus Printing Co.*, 1 N. D. 434, 48 N. W. 347. Those who do not vote are bound by the action of those who do. *State ex rel. Martin v. Chute*, 34 Minn. 135, 24 N. W. 353. It would seem that those who withdraw should be in no better position to attack the proceedings than those who are present and do not vote. Every stockholder's right is protected by the requirement that the meeting be conducted in a parliamentary manner. See *Procter Coal Co. v. Finley*, 98 Ky. 405, 33 S. W. 188. The decision in the present case seems sound. Under any other rule important corporate action might be indefinitely delayed by a faction of the stockholders.

EQUITY — JURISDICTION — DISCRETION OF COURT IN GRANTING RELIEF. — The plaintiff's agent purported to sell the plaintiff's land as his own to the defendants. He later represented to the plaintiff that he had sold it to another, but paid over part of the money received from the defendants. The plaintiff brought a bill to quiet title. *Held*, that if the defendants will pay the balance of the purchase price which the plaintiff believed to be due him, the plaintiff should convey to them. *Haswell v. Standring*, 132 N. W. 417 (Ia.).

In order to achieve an equitable result the court has fastened on the plaintiff a bargain which he has not made. Such action is open to two objections. It denies the plaintiff the right to make his own bargain and in so far does him injustice, and further it destroys all certainty in the settlement of disputes.

If the court may choose what bargain it will enforce, as being the most equitable, or what the parties might have done had they known the facts, the law will vary with the opinion of the individual chancellor. *Cf. GRAY, RULE AGAINST PERPETUITIES*, 2 ed., 590-603. The whole tendency of modern judicial thought has been against such uncertainty. See 1 *POMEROY, EQUITY JURISPRUDENCE*, 3 ed., § 59. While the doctrine of doing equity forces the plaintiff to respect rights of the defendant growing out of the transaction from which relief is demanded, it will not go so far as to force him to respect rights which the defendant does not have. *Manternach v. Studd*, 240 Ill. 464, 88 N. E. 1000. That the court believes it better for the defendant that he should have those rights should not be enough to justify it in creating them.

EXEMPTIONS — COUNTERCLAIM IN AN ACTION TO RECOVER PROPERTY EXEMPT BY STATUTE FROM EXECUTION. — In an action by a plaintiff for wages which were exempt by statute from attachment and execution, the defendant pleaded a counterclaim. *Held*, that the counterclaim should not be allowed. *Bradley v. Earle*, 132 N. W. 660 (N. D.).

The necessity of a liberal construction of exemption statutes, to give effect to the real intent of the legislature that a certain amount of the debtor's property be exempt from any kind of coercive process of the law, is most apparent perhaps in cases where a set-off of a debt has not been permitted against a judgment recovered against the creditor for a wrongful seizure of the exempt property. *Treat v. Wilson*, 65 Kan. 729, 70 Pac. 893; *Moore v. Graham*, 29 Tex. Civ. App. 235, 69 S. W. 200. Any other rule would seem to render exemption statutes nugatory. Some courts, however, have refused to make a liberal construction of the exemption statutes, limiting the exemption to the property itself, not including judgments representing such property, and to cases where the exemption is claimed on an actual execution. *Temple v. Scott*, 3 Minn. 419; *Caldwell v. Ryan*, 210 Mo. 17, 108 S. W. 533. The principal case, however, is in accord with the great weight of authority, which holds, it would seem correctly, that allowing a set-off in any case where what the plaintiff is suing for would ordinarily be exempt from attachment or execution, would subvert the purpose of the exemption statutes. *Millington v. Laurer*, 89 Ia. 322, 56 N. W. 533; *Collier v. Murphy*, 90 Tenn. 300, 16 S. W. 465.

FEDERAL COURTS — JURISDICTION BASED ON NATURE OF SUBJECT MATTER — SUIT AGAINST CORPORATION ORGANIZED UNDER ACT OF CONGRESS FOR UNORGANIZED TERRITORY. — The defendant corporation was incorporated under an act of Congress which extended over Indian Territory certain laws of Arkansas relating to corporations. This unorganized territory later became the State of Oklahoma, in the court of which state this suit was originally brought. *Held*, that the cause cannot be removed to the federal court. *Boyd v. Great Western Coal & Coke Co.*, 189 Fed. 115 (Circ. Ct., E. D. Okl.).

Corporations of the United States organized under acts of Congress are entitled to remove into the federal courts suits brought against them in state courts, since such suits arise under the laws of the United States. *Pacific Railroad Removal Cases*, 115 U. S. 2, 5 Sup. Ct. 1113. Whether corporations organized under territorial laws come within this rule is not clear on the authorities. Corporations organized under acts of territorial legislatures have not been considered federal because of their local nature. *Maxwell v. Federal Gold & Copper Co.*, 155 Fed. 110. *Cf. United States v. Pridgeon*, 153 U. S. 48, 14 Sup. Ct. 746. However, the contrary view is taken where corporations are organized under acts of Congress for unorganized territories. *Canary Oil Co. v. Standard Asphalt & Rubber Co.*, 182 Fed. 663. It is difficult to perceive any substantial distinction between these cases. Acts of territorial legislatures are really vicarious acts of Congress. See *Snow v. United States*, 18 Wall. (U. S.) 317, 321;

Binns v. United States, 194 U. S. 486, 491, 24 Sup. Ct. 816, 817. Moreover, the United States Supreme Court has held corporations to be federal when formed under acts for the District of Columbia. *Knights of Pythias v. Kalinski*, 163 U. S. 289, 16 Sup. Ct. 1047. But see *Daly v. National Life Ins. Co.*, 64 Ind. 1. The principal case must rest on the proposition that upon the admission of a territory into the Union corporations created under territorial law become *de jure* corporations of the state. See *Kansas Pacific Ry. Co. v. Atchison, Topeka & Santa Fé R. Co.*, 112 U. S. 414, 415, 5 Sup. Ct. 208.

INSURANCE — DEFENSES OF INSURER — SUICIDE OF INSURED. — A life insurance policy waived the statutory defense of death by suicide. *Held*, that the waiver was not contrary to public policy. *Mutual Life Ins. Co. v. Durden*, 72 S. E. 295 (Ga., Ct. App.). See NOTES, p. 283.

INSURANCE — INSURANCE AGENTS — EFFECT OF DELIVERY OF POLICY TO AGENT. — An application for an insurance policy provided that the insurance should not take effect unless the policy was delivered to the insured. The policy was forwarded to a general agent of the company who failed to deliver it to the soliciting agent because of the indebtedness of the soliciting agent to the company. The applicant died before the policy was handed over to him or to the soliciting agent. *Held*, that there can be a recovery on the policy. *New York Life Ins. Co. v. Pike*, 117 Pac. 899 (Colo., Sup. Ct.).

It is generally held that delivery to the agent is delivery to the applicant, since the agent is not the agent to hold the policy for the company, but to hold it for and give it to the applicant. *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 30 S. E. 273; *Hallock v. Commercial Ins. Co.*, 26 N. J. L. 268. It is not material that the agent receiving delivery is not the agent who procured the application. *Kilborn v. Prudential Ins. Co.*, 99 Minn. 176, 108 N. W. 861. It has been held that the contract of insurance is not complete until communication to the applicant of the acceptance of the application. *Kilcullen v. Metropolitan Life Ins. Co.*, 108 Mo. App. 61, 82 S. W. 966; *Busher v. New York Life Ins. Co.*, 72 N. H. 551, 58 Atl. 41. But it is generally held that such communication is not necessary. *Hallock v. Commercial Ins. Co.*, *supra*; *Kilborn v. Prudential Ins. Co.*, *supra*. The correctness of the decisions in the latter cases would seem to depend on whether the application contemplated an acceptance by an act and whether that act had been done. The principal case may be supported on the ground that the application contemplated an acceptance by the act of the delivery of the policy to the insured or the company's agent for him.

INTERSTATE COMMERCE — CONTROL BY STATES — JURISDICTION OF STATE COURT OVER ACTION BY CARRIER TO RECOVER UNPAID BALANCE OF SCHEDULE RATE. — A carrier by mistake charged less for an interstate shipment of freight than the rate scheduled in accordance with the Interstate Commerce Act. *Held*, that the carrier can maintain an action for the difference in a state court. *Baltimore & Ohio Southwestern Ry. Co. v. New Albany Box & Basket Co.*, 96 N. E. 28 (Ind., App. Ct.).

Any contract at variance with the schedule rate is void, and the carrier may recover the sum due him under the Act. *Louisiana Ry. & Navigation Co. v. Holly*, 127 La. 615, 53 So. 882. *Cf. Texas & Pacific Ry. Co. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628. In the absence of federal regulation to the contrary, state courts may entertain suits arising from interstate commerce. *Midland Valley R. Co. v. Hoffman Coal Co.*, 91 Ark. 180, 120 S. W. 380; *Western Union Tel. Co. v. Call Publishing Co.*, 181 U. S. 92, 21 Sup. Ct. 561. Federal statutes may be enforced in state courts. *Central of Georgia Ry. Co. v. Sims*, 169 Ala. 295, 53 So. 826; *Bradbury v. Chicago, R. I. & P. Ry. Co.* 149 Ia. 51, 128 N. W. 1.

Section 9 of the Interstate Commerce Act, however, deprives state courts of jurisdiction over shippers' suits for its violation. *Van Patten v. Chicago, M. & St. P. R. Co.*, 74 Fed. 981; *Copp v. Louisville & Nashville R. Co.*, 43 La. Ann. 511, 9 So. 441. The fact that the carrier sues in the principal case would seemingly take it out of this section and be a short ground for the decision. The court, however, goes on the broader but correct theory that the carrier sues for services rendered and not for the violation of the statute, which merely annuls the agreement as to special charges and fixes the amount of recovery. *Georgia R. Co. v. Creety*, 5 Ga. App. 424, 63 S. E. 528. Cf. *Gerber v. Wabash R. Co.*, 63 Mo. App. 145. An analogous situation where the state court's jurisdiction is clear arises in suits by the shipper, in which, to avoid the defense of special contract, he relies upon a federal statute forbidding limitation of the carrier's common-law liability. *Galveston, H. & S. A. Ry. Co. v. Piper Co.*, 52 Tex. Civ. App. 558, 115 S. W. 107; *Fry v. Southern Pacific Co.*, 247 Ill. 564, 93 N. E. 906.

LIMITATION OF ACTIONS — ACCRUAL OF ACTION — BREACH OF CONTRACT TO MAKE GIFT AT DEATH IN CONSIDERATION OF SERVICES DURING LIFE. — The plaintiff promised to take the defendant's testatrix into her house and care for her as long as she lived, and the latter promised to give the plaintiff \$70 per month and \$20,000 at her death. In 1900 the defendant's testatrix left the plaintiff's house and made a similar agreement with the defendant, with whom she remained till her death in 1907, and to whom she left her property. The plaintiff now brings suit for her legacy and the defendant pleads that the action is barred by the Statute of Limitations. Held, that the plaintiff can recover for the breach of contract by the testatrix. *Ga Nun v. Palmer*, 46 N. Y. L. J. 257 (N. Y., Ct. App., Oct. 3, 1911).

The decision in this case is reached by applying the doctrine of anticipatory breach, whereby, when one party to a contract repudiates it before the time set for performance, the other may sue immediately or await the time when performance is due. *Frost v. Knight*, L. R. 7 Exch. 111. See *Howard v. Daly*, 61 N. Y. 362, 374. It follows that, if the injured party elects not to sue, the Statute of Limitations will not begin to run until the time appointed for performance. *Foss-Schneider Brewing Co. v. Bullock*, 59 Fed. 83. There is difficulty, however, in applying this reasoning to the principal case, for the breach alleged is not anticipatory. Even where the theory of anticipatory breach is rejected, it is held that when one party by refusing necessary coöperation prevents the other from performing, the injured party can at once sue for the breach of the implied promise not to prevent performance and recover in damages the present value of his entire claim. *Edwards v. Slate*, 184 Mass. 317, 68 N. E. 342; *Parker v. Russell*, 133 Mass. 74. The earlier New York decisions recognized this principle and held that the statute began to run immediately. *Bonesteel v. Van Etten*, 20 Hun (N. Y.) 468; *Henry v. Rowell*, 31 N. Y. Misc. 384, 64 N. Y. Supp. 488, aff'd in 63 N. Y. App. Div. 620, 71 N. Y. Supp. 1137. Cf. 24 HARV. L. REV. 676.

LIMITATION OF ACTIONS — OPERATION AND EFFECT OF BAR BY LIMITATION — RIGHT TO CONTRIBUTION OF CO-OBLIGOR ON NOTE UNDER SEAL. — The plaintiff and the defendant executed a joint note under seal, which the plaintiff paid in full, taking an assignment to himself. Suit was brought for contribution after the period of limitation as to actions on simple contracts had expired, but before the expiration of the period for actions in equity and on contracts under seal. Held, that the plaintiff's claim is barred. *Liverman v. Cahoon*, 72 S. E. 327 (N. C.).

The general rule is that a co-obligor who has paid the joint obligation is entitled to be subrogated to all the rights and remedies against the defaulting

co-obligor which the creditor had before payment. *Orem v. Wrightson*, 51 Md. 34; *Smith v. Latimer*, 54 Ky. 75. The theory is that even though the obligation is discharged as to the creditor, in equity both it and the securities are regarded as assigned to the paying co-obligor. *Lumpkin v. Mills*, 4 Ga. 343. See 4 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 1419. If the doctrine were fully applied in the principal case, since the creditor would not be barred, the plaintiff could recover in equity. See *Hull v. Myers*, 90 Ga. 674, 684, 16 S. E. 653, 655. But the weight of authority denies subrogation when the sole object of the suit in equity is to avoid the Statute of Limitations. *Faires v. Cockerell*, 88 Tex. 428, 31 S. W. 190, 639; *Burrus v. Cook*, 215 Mo. 496, 114 S. W. 1065. The claim in the principal case is for contribution only. *Chipman v. Morrill*, 20 Cal. 131. The statutory period for implied contracts should apply. *Johnston v. Belden*, 49 Ia. 301. Even though the claim was originally enforceable in equity, the proper construction of the Statute of Limitations would require the suit in equity to be barred when the identical claim is outlawed at law. *Junker v. Rush*, 136 Ill. 179, 26 N. E. 499. In reality the facts constitute no cause for equitable relief. *Sexton v. Sexton*, 35 Ind. 88.

MECHANICS' LIENS — CONSTITUTIONALITY OF LAW GIVING LIEN IN SPITE OF WAIVER BY PRINCIPAL CONTRACTOR. — A statute provided for a lien in favor of sub-contractors and material men, "whether or not the original contractor could have obtained a lien or was by contract or conduct divested of the right to obtain a lien." Held, that this portion of the act is unconstitutional, as a deprivation of property without due process of law. *Kelly v. Johnson*, 44 Chic. Leg. News 89 (Ill., Sup. Ct.). See NOTES, p. 274.

MORTGAGES — EQUITABLE MORTGAGES — WHETHER AFTER-ACQUIRED PROPERTY CLAUSE INCLUDES PROPERTY ACQUIRED BY A COMPANY INTO WHICH MORTGAGOR HAS MERGED. — A railroad company mortgaged to its bondholders all its property, including that which should be thereafter acquired by the company to replace worn-out equipment. The company merged with another, and the consolidated company bought a freight car to replace an old one. The mortgage was foreclosed and the property sold to the plaintiff. Held, that the new freight car was properly included in the sale. *National Bank of Wilmington & Brandywine v. Wilmington, N. C. & S. Ry. Co.*, 81 Atl. 70 (Del., Ct. Ch.).

The doctrine of *Holroyd v. Marshall* seems to proceed upon the ground that a contract to mortgage after-acquired property is specifically enforceable in equity when the property is acquired. See 19 HARV. L. REV. 557. A consolidated company necessarily assumes the contract liabilities of all of its constituent corporations. DEL. LAWS, 1901-03, c. 394, § 60. But if the contract only included property to be acquired by the mortgagor, no statute could extend it to that acquired by the consolidated company, which is a distinct legal entity. *Shields v. Ohio*, 95 U. S. 319. As a question of construction, however, a reference to the mortgagor may perhaps include the new corporation, particularly regarded as the old company in a new form. This ambiguity would not exist as to a vendee of the mortgagor. *Hinchman v. Point Defiance Ry. Co.*, 14 Wash. 349, 44 Pac. 867. But in the principal case the court may fairly approximate the intentions of the party from all the circumstances of the mortgage, and the result reached seems in accord with justice. Cf. *Hamlin v. Jerrard*, 72 Me. 62. *Contra*, *New York Security & Trust Co. v. Louisville, etc. R. Co.*, 102 Fed. 382, 398. A different result should be reached if the terms as applied to the consolidated company created a greater liability than that contemplated for the mortgagor. Cf. *Pullman's Palace Car Co. v. Missouri Pacific Ry. Co.*, 115 U. S. 587, 6 Sup. Ct. 194; *Chicago, etc. Ry. Co. v. Kansas City, etc. R. Co.*, 38 Fed. 58.

PARENT AND CHILD — WHETHER MARRIAGE OF INFANT EMANCIPATES HIM. — Two minors above the age of consent married. The wife obtained a divorce and a decree for temporary alimony. The defendant had no property, and his father received his wages and services. *Held*, that he is not in contempt for failure to pay the alimony. *Austin v. Austin*, 132 N. W. 495 (Mich.).

By the great weight of authority the lawful marriage of an infant, whether with or without the parent's consent, entitles the infant to his earnings for the support of his family. *Commonwealth v. Graham*, 157 Mass. 73, 31 N. E. 706; *Aldrich v. Bennett*, 63 N. H. 415. *Contra*, *White v. Henry*, 24 Me. 531. The highest considerations of public policy demand that this be so. In allowing infants to contract a new relationship, the obligations of which are inconsistent with those of a child toward its parent, the law should sever the latter so that the infant wife may enjoy the companionship and protection of her husband, and the infant husband may apply his earnings to the maintenance of his new family. The principal case, decided on the ground that marriage alone does not emancipate a male minor, would therefore seem to be opposed to authority and wrong on principle. However, it follows the established rule of its jurisdiction. *People v. Todd*, 61 Mich. 234, 28 N. W. 79.

PRESCRIPTION — PROFIT À PRENDRE — ACQUIREMENT BY THE PUBLIC OF RIGHT OF FISHING IN PRIVATE WATERS — ACQUIREMENT BY FREEHOLD INHABITANTS OF RIGHT OF FISHING IN PRIVATE WATERS. — The plaintiff claimed the exclusive right of fishing in a large navigable but non-tidal lake, through grants by the Crown in 1605 and certain evidence of possession at various times thereafter. The public had for centuries openly, as of right, and without interruption, fished in the lake. *Held*, that the plaintiff is entitled to an injunction restraining one of the public from fishing. *Johnston v. O'Neill*, [1911] A. C. 552.

Riparian proprietors along a navigable but non-tidal river claimed the exclusive right of fishing therein. Freeholders in certain parishes along the river had for centuries, openly, continuously, and as of right, fished in the river for commercial purposes. *Held*, that the riparian proprietors have the exclusive right claimed. *Harris v. Earl of Chesterfield*, [1911] A. C. 623. See NOTES, p. 280.

PUBLIC SERVICE COMPANIES — RIGHTS AND DUTIES — DISCRIMINATION IN RAILROAD RATES FOR SUBURBAN SERVICE. — An electric railway company for seven years maintained exceptionally low rates, which resulted in the growth of a large suburban population composed of those employed in neighboring cities. Thereafter a general advance in rates made it impossible for most of these people to afford the daily trip and they were moving back to the cities in large numbers. On a complaint made against the advance, the state railroad commission ordered the restoration of the old rates within a ten-mile zone. These rates were shown to be unremunerative beyond covering the cost of the service, but it appeared that through the advanced rates allowed to remain upon the balance of the company's traffic, it was able to earn a profit of seven per cent upon its total capitalization. The company appealed from the order of the commission. *Held*, that the order be sustained. *Puget Sound Electric Ry. v. Railroad Commission*, 117 Pac. 739 (Wash.). See NOTES, p. 276.

RECEIVERS — ANCILLARY APPOINTMENT OF RECEIVERS IN FEDERAL COURTS. — Receivers were properly appointed for a company in the Federal Circuit Court of Delaware. They filed an *ex parte* bill, which was granted, in an Illinois Circuit Court to confirm their previous appointment, and, as ancillary to that appointment, appoint them receivers in that district. The bill prayed

for no distinct equitable relief. *Held*, that this proceeding does not invest these foreign receivers with powers to sue in Illinois. *Fairview Fluor Spar & Lead Co. v. Ulrich*, 44 Chic. Leg. News 81 (C. C. A., Seventh Circ.). See NOTES, p. 282.

RIGHT OF SUPPORT — DRAINAGE OF PERCOLATING WATERS. — The defendant, while draining its land, withdrew water from the subterranean soil of the plaintiff's adjoining land. This caused a consolidation of the earth and a settlement of the surface, to the damage of the plaintiff. *Held*, that the plaintiff cannot recover. *New York, etc. Filtration Co. v. Jones*, 39 Wash. L. R. 718 (D. C., Ct. App.).

This case seems to be the first American decision on the subject. It follows the well-settled English rule that the right of lateral support of an adjoining landowner is subordinate to one's own right of intercepting percolating waters. *Popplewell v. Hodgkinson*, L. R. 4 Exch. 248; *North-Eastern Ry. Co. v. Elliot*, 1 Johns. & H. 145. The reason for this doctrine is that otherwise there would be a tendency to restrict the improvement of land for engineering, agricultural, and similar purposes. See 20 HARV. L. REV. 487.

TORTS — INTERFERENCE WITH BUSINESS OR OCCUPATION — COMPETITION BETWEEN WHOLESALE AND RETAILER. — The defendant, a wholesaler of oil, when the plaintiff, a retailer, began purchasing of other wholesalers, entered into the retail business to drive the plaintiff from business, and by means which involved trespasses and fraud ruined the plaintiff's business. The defendant then retired from the retail business. *Held*, that the plaintiff has a cause of action against the defendant. *Dunshee v. Standard Oil Co.*, 132 N. W. 371 (Ia.).

Modern authority holds an intentional interference with the plaintiff's business an actionable wrong which calls for justification. *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 53 Atl. 230. See *Mogul Steamship Co. v. McGregor, Gow & Co.*, 23 Q. B. D. 598, 613. If the defendant is directly or indirectly a real business competitor of the plaintiff, he is justified, unless methods unlawful *per se* are used. *Robison v. Texas Pine Land Association*, 40 S. W. 843 (Tex.). Cutting prices is not a method of business which of itself will destroy the justification of competition. *Passaic Print Works v. Ely & Walker Dry Goods Co.*, 105 Fed. 163; *Mogul Steamship Co. v. McGregor, Gow & Co.*, *supra*. The principal case professes to follow a case holding a banker liable for setting up a barber shop, not for profit, but solely to injure the plaintiff's business. *Tuttle v. Buck*, 107 Minn. 145, 119 N. W. 946. See 22 HARV. L. REV. 616. But in that case there was no competition between the parties, and hence no justification. There are competitive interests which justify a retailer's attempt to control the business policy of a wholesaler of the same commodity. *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119. The same interests would seem to justify a wholesaler's attempt to control the business policy of a retailer. The actual decision of the principal case is correct, since fraud and trespass are means which are unlawful *per se*, and hence destroy the justification of competition. *American Waltham Watch Co. v. United States Watch Co.*, 173 Mass. 85. It was unnecessary, therefore, for the court to take the ground that the purpose of the defendant itself destroyed that defense. *Cf. Dunshee v. Standard Oil Co.*, 126 N. W. 342 (Ia.).

TRUSTS — CREATION AND VALIDITY — BEQUEST UPON SECRET UNDERSTANDING. — A woman who desired to leave her property to certain charities was warned by her solicitor that such a bequest would be void under the local mortmain statute. She therefore made an absolute bequest to a trust company of which the solicitor was an assistant trust officer. *Held*, that there is a trust for charity rendering the gift void. *In re Stirk's Estate*, 81 Atl. 187 (Pa.).

Where a testator makes an absolute gift with the understanding that the donee shall transfer the property received to a third party, the donee will be made to hold as trustee for that third party. *Hoge v. Hoge*, 1 Watts (Pa.) 163. These trusts are imposed on the ground that it would be fraud for the donee to take absolutely, knowing that he is only meant to take for another's benefit. See *Matter of O'Hara*, 95 N. Y. 403, 413. If there is actual communication of the testator's wishes to the donee, the courts hold that his silence amounts to a consent to a trust. See *Trustees of Amherst College v. Ritch*, 151 N. Y. 282, 324, 45 N. E. 876, 887. More accurately, he is bound whether he consents or not. But to impose a trust some connection previous to the testator's death must be established between the donee to be charged and the testator's intentions. *Wallgrave v. Tebbs*, 2 Kay & J. 313; *Schultz's Appeal*, 80 Pa. St. 396. In the principal case this must rest entirely upon the relation of the solicitor to the trust company. Moreover, it is somewhat difficult to work out an intent of the testatrix to impose a trust, in the absence of which there could be no trust. *Lomax v. Ripley*, 3 Smale & G. 48.

WATERS AND WATERCOURSES — SURFACE WATERS — RIGHT TO FACILITATE DRAINAGE. — A valley draining the surface water in boggy soil ran through two adjoining farms. The owner of the upper farm constructed a system of drains in his part of the valley which temporarily increased the amount of water discharged upon the lower farm, but did not divert the direction of flow. Held, that the lower owner is not entitled to an injunction. *Perry v. Clark*, 132 N. W. 388 (Neb.).

The civil-law rule that the lower estate must receive the natural flow of surface water obtains in many jurisdictions. *Pinkstaff v. Steffy*, 216 Ill. 406, 75 N. E. 163. See *Central of Georgia Ry. Co. v. Keyton*, 148 Ala. 675, 41 So. 918, 921. Under this rule, diversion or unnatural increase of the flow is actionable. *Rhoads v. Davidheiser*, 133 Pa. St. 226, 19 Atl. 400. Cf. *Livingston v. McDonald*, 21 Ia. 160. But it has been expressly held that this does not apply where the change results from improvements in city lots. *Hall v. Rising*, 141 Ala. 431, 37 So. 586. See *Los Angeles Cemetery Association v. City of Los Angeles*, 103 Cal. 461, 467, 37 Pac. 375, 377. But see *Garland v. Aurin*, 103 Tenn. 555, 561, 53 S. W. 940, 941. And there is a tendency to subordinate the rule to the interest of good husbandry by allowing reasonable changes in the drainage. *Fenton & Thompson R. Co. v. Adams*, 221 Ill. 201, 77 N. E. 531. Other jurisdictions accept the common-law doctrine that surface water is a common enemy, against which anyone may defend himself. *Walker v. New Mexico & Southern Pacific R. Co.*, 165 U. S. 593; *Cass v. Dicks*, 14 Wash. 75, 44 Pac. 113. This is the rule in the jurisdiction of the principal case. *Morrissey v. Chicago, Burlington & Quincy R. Co.*, 38 Neb. 406, 56 N. W. 946. This right usually affords ample protection against interference with the flow, and no action is allowed therefor. *Gannon v. Hargadon*, 10 All. (Mass.) 106; *Manteufel v. Wetzel*, 133 Wis. 619, 114 N. W. 91. Some jurisdictions qualify this right by allowing an action where the interference is unnecessary or negligent. *Brown v. Winona & Southwestern R. Co.*, 53 Minn. 259, 55 N. W. 123. See *Aldritt v. Fleischauer*, 74 Neb. 66, 70, 103 N. W. 1084, 1085. Since in the principal case the drains were beneficial, and there was no diversion, and the increase was only temporary, the decision is clearly right.

BOOK REVIEWS.¹

COMMENTARIES ON COLONIAL AND FOREIGN LAWS. By William Burge. New Edition edited by Alexander Wood Renton and George Grenville Phillimore. In six volumes. Vols. 1-3. London: Sweet and Maxwell, Limited; Stevens and Sons, Limited. 1910. pp. xxxviii, 420; xlv, 629; xlix, 987.

A new edition of Burge's Colonial Law has long been desired. For nearly half a century the work has been out of print, yet it has been a mine of information as to the nature of the laws of British Colonies and as to the rules which have been adopted for solving their conflicts.

Burge was not only learned in the nature of the various systems of Colonial Law, but he was one of the most thorough students and able lawyers who has ever written on that difficult topic, the Conflict of Laws. Indeed, up to the time of Dicey his work was the authority on that topic in England; and in spite of excellent points in the treatises of Westlake, Phillimore, and others, his suggestions remain the most acute and lawyerlike on the topic, with the exception of Professor Dicey's admirable work.

The main value of this treatise consists in its collection of actual laws of all civilized countries on the points covered, and also a summary of the doctrines held in those countries upon the Conflict of Laws. It is then as a store-house of information as to the actual doctrines of substantive law and of the Conflict of Laws that we welcome the new edition of this work. The editors are competent, and have been assisted by a corps of able lawyers taken from, or familiar with, the law in various portions of the world. If the law of the United States is somewhat inadequately dealt with, we can hardly be surprised; for to deal with it as fully as the colonial law is dealt with would mean to examine the statutes and decisions of each of our fifty jurisdictions, and would be far beyond even the greatly extended scope of this new edition. American lawyers will not feel the need of a fuller discussion of the law of the United States; but they will on the other hand find of the utmost value the admirable statement of the laws of France, Germany, and the British Colonies. They will find here, in short, all that will usually be essential to know on the topics covered in this work.

Volume one includes an admirable statement of the nature and history of the various systems of law prevalent in the civilized world, and particularly of the laws in the British Colonial Empire. The volume is prefaced by a short memoir of William Burge. Most of the material in this volume is new. The second volume deals with Domicile and Nationality, and with some cases of Status; Marriage and Divorce forming the subjects of the third volume. Three volumes more are to follow and complete the work.

Regarded, as has already been pointed out, as a store-house of information as to the actual law of the various countries on these subjects, the work serves its purpose admirably; and it would be difficult to improve upon it in accuracy or conciseness of statement, or, generally speaking, in knowledge and understanding of the laws described. The editors follow Burge's practice of stating the actual law of the different countries and then the principles adopted for solving the Conflict of Laws. In lucidity of arrangement the new edition is a great improvement on the old. For the purposes of an American lawyer, however, the actual discussion of general principles is not altogether to be depended on. That part of the work which involves the discussion of the Conflict of Laws seems from internal evidence to have been left in the able hands of Mr. Phillimore, whose scholarship and long familiarity with the subject renders him of course competent, and his opinion is worthy of all consideration. Unfortunately, however, Mr. Phillimore belongs to that school of English scholars who are trained chiefly in the civil law, and who discuss the Conflict

of Laws, or, as he prefers to call it, Private International Law, rather from the point of view of Laurent and von Bar than from the point of view of Dicey and Story and of the English and American courts. In short, for an English or American lawyer, the Conflict of Laws must be regarded as a branch of the common law, to be determined by the practice of the common-law courts, like any other branch of the common law; and the naturally different views of courts and jurisdictions trained in continental law can hardly be received as illuminating. Such portions of the work, therefore, as involve an attempt to discuss the present state of the Conflict of Laws in England and America is not altogether to be regarded as authoritative.

But while the American and English lawyer will hardly find in this work an authoritative treatise on the Conflict of Laws, that fact does not in the least diminish its extreme usefulness as a book of reference for foreign law, whether that foreign law be the law of Marriage or other personal status, or the doctrines of Private International Law, as applied in foreign countries. In this, the principal subject of the work, Burge's treatise has no rival, and must fill a most important place in the library of every lawyer whose practice extends beyond the narrow limits of his own country. And in this respect the work has been admirably edited and modernized. It is full of references to the decisions of continental courts, mediæval as well as modern, and to the writers of treatises, modern as well as mediæval. The inaccuracy and inadequacy of its treatment of American authorities has been pointed out, but it is hardly a defect to an American lawyer, who will go to the book for information on foreign law; and he will certainly find what he needs.

J. H. B.

INTRODUCTION TO THE SCIENCE OF LAW. Systematic Survey of the Law and Principles of Legal Study. By Karl Gareis. Translated from the third, revised edition of the German. By Albert Kocourek. With an Introduction by Roscoe Pound. Boston: The Boston Book Company. 1911. pp. xxix, 375.

This is the second of the Jurisprudence and Philosophy of the Law Series published by the Boston Book Company, the first being Korkunov's "Theory of Law" translated by Judge Hastings. A recent review of the latter translation opens with the following noteworthy statement: "With the exception of Pulszky's Theory of Law and Civil Society, this is the only modern account of Continental juristic thought accessible to the reader of English."¹ If, then, Gareis' third edition is of value to the Anglo-American reader, and if the translation is well done, Professor Kocourek has rendered our lawyers a service of special interest.

The work in the original, which belongs to the class of Arndts', Kohler's, and Merkel's *Encyklopädie*, is intended to be read as a text-book on German Law in connection with lectures in the introductory course on law in a German university. It is a juristic survey and aims at a systematic review of the law as a whole. After a brief introduction pointing out the object of a survey of the law, the author in the first part deals at length with the nature of law and of the sources of law. The bulk of the book, however, consists of a classification of (A) Civil or Private Law and (B) Public Law. Such a treatment might easily fail for want of concreteness, but in common with other recent German texts there is no want of practical application, for the writer never wanders far from the German Civil Code. This has the weakness of eliminating the comparative side of continental law, but to those of us who are willing to read thoughtfully and make our comparisons for ourselves, it is difficult to find a

¹ 10 Col. L. Rev. 585.

more compact, suggestive, and accurate exposition of a great legal system of modern times. Of clear condensed expression we have many examples, namely, in the sections and paragraphs entitled, the historical evolution of the German Civil Law, p. 114, three kinds of collision of conflicting legal standards, p. 71, the rights of personality, a suggestive phrase, p. 125. The style is direct and sure in tone with a straightforwardness which leaves no doubt in the reader's mind of the author's own views on the points made. The suggestive character of the work is found in a number of well-turned definitions, such as: "Legislation is a declaration of the dominant social organism by which a legal standard is created or imposed," p. 80, and in the notes which direct the scholar to valuable fields of investigation. In fact any investigator of a point of German law may well turn first to Gareis for a starting point without fear of being led into unprofitable labors. The references to sections of the German Code abound, and a partial test by verifying a number of them at random reveals no inaccuracy.

There are three ways of approaching the law, or three schools of jurists, the analytical, the historical, and the ethical or philosophical. The analytical jurist thinks of law as the product of a determinate human will. The historical and philosophical schools agree that law is found not made, differing with respect to what is found; the historical jurist finding law in a rule of action founded on the experience of mankind in the past, the philosophical finding law in those rules which fit ideally the needs of society. In England the works on jurisprudence are primarily analytical; while in Germany emphasis is laid more on the historical and philosophical side, methods which Gareis chiefly employs, and, indeed, has further developed in this edition. Yet in many places in the book there is a distinctly Austinian tinge, such as on p. 75: "the authority of the state, however, lends to all of these rules the character of legal rules;" and again on pp. 29, 37 and 74. He ends his discussion of customary law by saying: "The authority of customary law as a legal standard is due, however, only to the dominant social organism," p. 79. And again: "The claims of justice are not law in themselves, even though the legal sentiment of a whole people would annex them and seek to discover in them the ideal of the development of law," p. 48. "Justice or equity of itself lacks external authority," p. 48. In fact the book shows many indications of the modern tendency of the Germans to throw off the burden under which they have labored for years of "*Nicht positivisches recht*." An inability to appreciate Bentham and Austin, a notion that there may be doctrines in the community not enforced by the courts which may yet be law, have hampered German jurists in clear thinking and in arrival at sound results. These happily have not been the inclination of recent writers,² and Gareis promotes this new turn of thought.

The work of the translator seems well done. The English is idiomatic, yet the translation faithful. There is a valuable introduction by Professor Roscoe Pound stating the relation of the book to German and English legal thought.

J. W.

COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS. By John F. Dillon. Fifth edition. In five volumes. Boston: Little, Brown and Company. 1911. pp. lxi, 778; xiii, 774; xii, 755; xiii, 755; iv, 738.

In this Fifth Edition of his Municipal Corporations Judge Dillon completes the structure of this monumental work. He need have no fear that anyone will charge him with an author's vanity by reason of the justifiable satisfaction he feels in its wonderful success. He lets us know in his delightful preface how the original book was written; and we can well understand why it was that

² 25 HARV. L. REV. 144, 145.

his book has had such great influence on the making of the law of municipal corporations. Beginning with Vol. 1 of the State of Maine, he went through the successive reports of that state; and in like manner he went through page by page the reports of every one of the states and of the federal and English courts. Dillon on Municipal Corporations is, therefore, proof positive of the fundamental theory of the common law that from all the precedents one may get the whole truth about things as they are — and, indeed, a strong impression as to how things ought to be. This is the fifth edition, which the profession has demanded so as to have an authoritative exposition of the continued growth of this department of the law. There is, therefore, no necessity for any extended review of the main portion of this great treatise. It need simply be noted that in the rewriting of the standard sections the amount of matter has been greatly increased and the list of cases cited has been startlingly lengthened. Many entirely new chapters have been added by Judge Dillon in this edition, such as those upon Public Utilities and Municipal Indebtedness; and there are new subjects worked into the old chapters, such as Self-government and Civil Service. This reviewer has only examined with care the new chapter upon Public Utilities. He has been impressed in reading that chapter with the great skill of the eminent writer in working out the fundamental principles of this new system of law from the comparatively few authorities at his disposal. The work in this chapter is comparable to that which the author had to do on the whole subject in the original edition when he created a law of municipal corporations out of the then comparatively few cases dealing with the subject. It is plain that Judge Dillon still has not merely the genius in taking pains in collecting his material, but the ability to make it into a practical system. One might wish that in all departments of law we had as authoritative texts as Dillon on Municipal Corporations; but it is, perhaps, just as well that we have not. If this were so, we might be tempted to give over our study of precedents in every new matter which arises, and rely upon the standard text on that subject. If we should once change our attitude towards the study of precedents, we should get no more texts like Dillon on Municipal Corporations.

B. W.

NEW CODE OF INTERNATIONAL LAW. By Jerome Internoscia. New York: The International Code Company. 1910. pp. lxvi, 1003.

This volume covers both International Law and Conflict of Laws. It anticipates the time when the nations of the whole world will be united, at least to the extent of having an international tribunal, and, in the language of the author, it is "a complete body of rules that would answer the needs of all nations, if only they would unite to revise and then adopt it as an 'International Code.'" As the existing law on international matters is not fully adapted to an ideal time of union and peace, the author necessarily creates a great part of the doctrines which he here weaves into his suggested system; but he estimates that only about one-third of his work is really new. There is no typographical distinction between what is conceded to be a novelty and what is conceived to be a statement of existent practice. Consequently it is impossible to use the volume as an aid in ascertaining what doctrines are now recognized or to test the author's accuracy. All that can be said is that the author's point of view is humanitarian to the last degree, that the scope of his volume is adequate, that the arrangement is appropriate, and that the language is usually clear. On each page the text is given in three languages, — English, French, and Italian. The practical utility of the volume seems to be slight, for even a future legislator as to the subject-matter here covered will need books more obviously connected with law as it is, and hence will prefer such codifications as those of Field, Bluntschli, and Fiore.

THE LAWS OF ENGLAND. By the Right Honourable the Earl of Halsbury and Other Lawyers. London: Butterworth and Company; Philadelphia: Cromarty Law Book Company.

Vol. XV. Food and Drugs to High Treason. 1911. pp. clxxi, 578, 59.

Vol. XVI. Highways to Induction. 1911. pp. ccvii, 692, 54.

Vol. XVII. Industrial Societies to Interpleader. 1911. pp. cxciii, 644, 61.

Vol. XV contains articles on Food and Drugs, Fraudulent and Voidable Conveyances, Friendly Societies, Game, Gaming and Wagering, Gas, Gifts, and Guarantee. Of these the article on Gifts is of much value, while that upon Guarantee is an excellent treatise by H. A. de Colyar upon the important and difficult subject of personal suretyship.

Vol. XVI contains articles on Highways, Streets and Bridges, on Husband and Wife (including the law of Marriage and of Divorce), and on the Income Tax, which is of especial interest to the American lawyer in view of the present effort towards a federal income tax.

Vol. XVII contains articles on Industrial Societies, Infants, Inhabited House Duty, Injunction, Inns and Innkeepers, Insurance, and Interpleader. This list of articles indicates the extreme value of this volume to the American lawyer.

The articles appear to maintain the high quality of those in the preceding volumes; and the magnitude of the work attempted becomes clearer as the successive volumes seem to bring us little nearer to the end of the alphabet.

J. H. B.

LEADING CASES AND STATUTES ON THE LAW OF EVIDENCE. By ERNEST COCKLE. Second Edition. London: Sweet and Maxwell, Limited. 1911. pp. xxviii, 371.

THE LIABILITY OF RAILROADS TO INTERSTATE EMPLOYEES. By Philip J. Doherty. Boston: Little, Brown and Company. 1911. pp. 371.

A HISTORY OF THE PRESIDENT'S CABINET. By Mary L. Hinsdale. Ann Arbor, Michigan: George Wahr. 1911. pp. ix, 355.

THE LAW OF THE AIR. By Harold D. Hazeltine. London: University of London Press. 1911. pp. vii, 152.

THE LAWS OF ENGLAND. By the Right Honourable the Earl of Halsbury and Other Lawyers. Volume XVIII. London: Butterworth and Company; Philadelphia: Cromarty Law Book Company. 1911. pp. ccxix, 746, 63.

ENGLISH CONSTITUTIONAL HISTORY. By Thomas Pitt Taswell-Langmead. Seventh Edition, by Philip A. Ashworth. London: Stevens and Haynes. 1911. pp. xxiv, 651.

STUDIES IN AMERICAN ELEMENTARY LAW. By Jno. C. Townes. Second Edition. Chicago: T. H. Flood and Company. 1911. pp. xxvii, 695.

A HISTORY OF THE AMERICAN BAR. By Charles Warren. Boston: Little, Brown and Company. 1911. pp. xii, 586.

NEUTRALIZATION. By Cyrus French Wicker. London, New York, Toronto: Oxford University Press. 1911. pp. viii, 91.

WATER RIGHTS IN THE WESTERN STATES. By Samuel C. Wiel. Third Edition. In two volumes. San Francisco: Bancroft-Whitney Company. 1911. pp. xlvi, 967; 969-2067.

THE CORPORATE NATURE OF ENGLISH SOVEREIGNTY. By W. W. Lucas. London: Jordan and Sons, Limited. 1911. pp. xvi, 91.

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NO. 4.

LEGAL CAUSE IN ACTIONS OF TORT.

[Concluded.]

IT remains to consider another argument in favor of the alleged rule of non-liability for improbable consequences, and one which has had great influence.

It is said¹ that, even if the rule, that probability is the legal test of the existence of causal relation, is open to serious objection, it is nevertheless the only practicable working test. The law must adopt *some* test; and this is asserted to be less objectionable than any other which has been, or can be, suggested.² And here it will be urged that our argument against the alleged rule is an instance of *petitio principii*. We have been assuming that the alleged rule, if applicable for any purpose, can be so only as an arbitrary rule restricting, or preventing, liability in cases where it has already been found that the causal relation does, as matter of fact, exist. But it will be said that this assumption begs the question. It will be contended that the alleged rule is to be applied as an absolute legal test in solving the primary inquiry whether the causal relation does or does not exist.³ If a certain result would antecedently have been improbable, then it will be said that it must be conclusively

¹ See "third" position, *ante*, 25 HARV. L. REV. 248.

² ". . . the only test left to resort to, a test which, though approved neither by logic nor justice, is yet better than none, better than to admit a limitless liability for all consequences of acts . . ." See Terry, *Leading Principles of Anglo-American Law*, § 410, where this language is used in reference to a somewhat different topic.

³ See Watson, *Damages for Personal Injuries*, § 142.

deemed impossible; in other words, the law will never, no matter how strong the proof may be, hold that defendant's tort actually caused plaintiff's damage, if such a result antecedently was improbable.

So far as the question whether the plaintiff's damage was in reality caused by the defendant's tort is one of fact, it would seem that the tribunal passing upon it should not be influenced by considerations of policy or expediency. If the court is to give the jury a definition of "legal cause" to be applied in solving the question of fact, that definition should not arbitrarily give artificial weight to any one particular circumstance, such as probability or improbability. Probability should not be made an absolute legal test of the existence of causal relation.

But some advocates of the rule we are combating appear to think that the choice is between adopting their rule or having no rule at all. They say that the law ought to lay down some definition or test of causation. Then they, in effect, take the position that no other practicable rule than this can be laid down.⁴ Hence they conclude that if their rule is rejected, defendants will be left at the mercy of juries. There must be an end somewhere to liability.⁵ If you reject the rule of non-liability for improbable consequences, what definite rule will you substitute for it; what other stopping place is there; what practical check upon the caprice of jurors?⁶

Here it should be said that some jurists are so much impressed with the danger of submitting to a jury any question connected with causation, that they are inclined to make the method of deciding questions of causation an exception to the methods generally prevailing as to other topics. They think that even questions of fact arising under any definition of causation must be decided solely by the judge and never submitted to the jury. They would say that "although a question of fact, it is one for the court to

⁴ ". . . it is absolutely the only rule of which the subject in its nature is susceptible, . . ." Watson, *Damages for Personal Injuries*, § 145.

⁵ See Salmond, *Jurisprudence*, ed. 1902, 478; Terry, *Leading Principles of Anglo-American Law*, § 528.

⁶ Mr. Sedgwick, in controverting the position that the degree of fault should govern the amount of remuneration, adverts to the danger that the courts "in despair of reducing the subject to principle," "will throw the responsibility of the matter on the jury, leaving everything to their vague, fluctuating, and all but uncontrolled discretion." 1 Sedgwick, *Damages*, 6 ed., 129.

determine.”⁷ Thus in *Hobbs v. L. & S. W. Ry. Co.*,⁸ Blackburn, J., said:

“I do not think that the question of remoteness ought ever to be left to a jury; that would be in effect to say that there shall be no such rule as to damages being too remote; and it would be highly dangerous if it was to be left generally to the jury to say whether the damage was too remote or not.”

This view simply amounts to establishing an arbitrary exception, grounded on distrust of jurors. We can see no sufficient reason for such a departure from legal analogies. If the methods of decision now prevailing as to other topics are followed here, then no definition of legal cause, no test of “remoteness,” can be given which will not result in submitting most close questions of causation to a jury. The very test we have been specially discussing, the test of probability or improbability, will present a question for the jury in all doubtful cases. Any legal definition of causation must raise the question whether all the requirements of the definition are found to be present in the particular case. No sound principle can be laid down by which the judge can always determine this question without infringing on the province of the jury.

*Engelhart v. Farrant and Co.*⁹ was an action for negligence. The County Court Judge, who tried the case without a jury, found for plaintiff. The Court of Appeal said, in substance: It is a question of fact whether certain negligence was “an effective cause” of the damage. If there were any real doubt as to this and the trial had been before a jury, this question must have been left to the jury. The Court of Appeal has power to draw obvious inferences of fact, and to exercise in this case the functions of a jury. The Court of Appeal finds no error in the decision of the County Court Judge upon this question of fact; and refuses to reverse the judgment.

Suppose, for the sake of argument, that there are only two alternatives: One, to adopt the test of probability; the other, to regard the question of the existence of causal relation as a pure question of fact; to be submitted by the judge to the jury without any explanation as to the meaning or requisites of the term “legal

⁷ See Clerk & Lindsell, *Torts*, 5 ed., 146, as to “remoteness.” And cf. Ladd, J., in *Gilman v. Noyes*, 57 N. H. 627, 633-635 (1876); 1 Sutherland, *Damages*, 3 ed., § 16.

⁸ L. R. 10 Q. B. 111, 122 (1875).

⁹ [1897] 1 Q. B. 240.

cause," without giving them any chart or compass to go by. Does the adoption of the latter view confer upon the jury absolute and unrestrained power over the pocket of the defendant? Anyone who gives an affirmative answer to this inquiry overestimates the power of the jury and ignores the functions of the judge. Indeed the legal doctrines as to this matter are so elementary that the following statement of them may seem unnecessary.

Even though it be assumed that the question of the existence of causal relation is one of fact for the jury, yet this proposition "is necessarily subject to the limitation affecting the submission of all questions of fact to the jury: that if on the evidence reasonable men can come to only one conclusion, there is no question for their [the jury's] decision."¹⁰ The law does not place in the hands of the jurors power to decide that the causal relation may be inferred from any state of facts whatever.¹¹

Before the question of causation can be submitted to the jury, there is a preliminary question to be decided by the judge; namely whether upon the evidence twelve honest men can reasonably find the existence of the causal relation. It is for the judge to say whether the jury *can* reasonably so find; and then, if he decides in the affirmative, it will be for the jury to say whether they *do* so find. The judge has to say whether on the evidence causal relation *may be* reasonably inferred; the jurors have to say whether from the evidence, if submitted to them, the causal relation *is* inferred by them.¹² The question of causation will not get to the jury at all, unless the judge thinks that twelve men can reasonably find that the defendant's tort was, at the moment of the happening of the damage, a (continuing efficient) cause of the damage and not a mere antecedent fact. This power of the judge, properly exercised, materially lessens the danger of an unjust result as to causation. And it is especially important in cases where the commission of the tort is remote in space or time from the happening of the damage.¹³

¹⁰ Parsons, J., in *McGill v. Maine & New Hampshire Granite Co.*, 70 N. H. 125, 129, 46 Atl. 684, 686 (1899).

¹¹ Cf. Lord Cairns, in *Metropolitan Ry. Co. v. Jackson*, 3 App. Cas. 193, 197 (1877). See Watson, *Damages for Personal Injuries*, §§ 170, 175.

¹² Salmond, *Torts*, 2 ed., 110-111, 29; Terry, *Leading Principles of Anglo-American Law*, § 72.

¹³ See Bishop, *Non-Contract Law*, §§ 44, 41; Mr. Labatt in 33 Can. L. J. 718, 721.

If the judge thinks that there is no reasonable evidence to justify a finding of causal relation, he will not submit the case to the jury.¹⁴ Conversely, if the judge thinks that the jury cannot reasonably fail to find the existence of causal relation, he can direct a verdict for the plaintiff, so far as this question of causation is concerned.

But while the above methods of procedure have the effect of narrowing the functions of the jury, yet it may be said that the result is simply to substitute uncertain and varying decisions of judges for similar decisions of jurors; and that in both cases it is equally impossible to foretell either the result or the grounds upon which the result will be reached.

Experience furnishes at least a partial answer to this objection.

The decisions of judges as to whether to submit cases to juries, even though the judge is to be regarded as thus passing upon a question of fact, nevertheless in time constitute a set of precedents, having great and frequently decisive weight in later cases. Whether this effect is produced rightly or wrongly, there can be no doubt that it is produced.¹⁵ The body of precedent that will thus be formed on the subject of causation may not be so large, nor carry so much weight, as the body of precedent that has already been formed on the question of the existence of negligence. But there certainly will be precedents as to causation, and the establishment of such precedents must always have a tendency "to narrow the field of uncertainty."¹⁶ There can be no precedents for the verdicts of juries.¹⁷ But there may be precedents upon the duty of judges to submit cases to juries.¹⁸

¹⁴ See Terry, *Leading Principles of Anglo-American Law*, § 550.

¹⁵ Sir William Markby in 2 *L. Mag. & Rev.*, 4th Series, 318, 322-324, 330-331; Holmes, *Common Law*, 120-129; Professor E. R. Thayer in 5 *HARV. L. REV.* 190-193; Terry, *Leading Principles of Anglo-American Law*, §§ 75, 195, 559.

¹⁶ See Holmes, *Common Law*, 127.

¹⁷ "A second incidental advantage of trial by jury is connected with this: it decides cases without establishing precedents." Sir J. F. Stephen, *General View of the Criminal Law of England*, 1 ed., 208.

¹⁸ Some decisions sustaining a demurrer to a declaration, and thus refusing to submit the question of causative relation to a jury, are very unsatisfactory. The judge sometimes seems to consider the case as if the question were, whether the judge, if himself a juror, would find for the plaintiff upon proof of the facts stated in the declaration. But the real question is, whether, upon any state of facts provable under the declaration, a jury would be at liberty to find for plaintiff. Sustaining the demurrer is, in effect, a decision that the declaration discloses no ground upon which a jury could reasonably find that causal relation existed.

Thus far we have been proceeding upon the supposition that, if the test of antecedent probability is rejected, it is impossible to frame any other legal test of causation; and that the question must be regarded as purely one of fact. And we have attempted to show that even this view does not give the jury wholly unrestrained power.

But is it true that no legal test can be framed to take the place of existing tests, all of which are unsatisfactory? Is it impossible for the judge, if he rejects the hitherto prevailing tests, to instruct the jury in such a way as to assist them in arriving at a right solution of the problem of causation? It has been said by reputable jurists that no definite principle can be laid down by which to determine the question of causation, or, to use the popular language, to determine whether damage in a given case is "proximate or remote." Some statements as to this are quoted in the note below.¹⁹

¹⁹ "It is unfortunate that no definite principle can be laid down by which to determine this question. It is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy, and precedent. . . . The best use that can be made of the authorities on proximate cause is merely to furnish illustrations of situations which judicious men upon careful consideration have adjudged to be on one side of the line or the other." 1 Street, *Foundations of Legal Liability*, 110.

"Not only is the line of demarcation between proximate and remote damage undefined and undefinable — it is really a flexible line" (here bringing out the fact that the law will declare damage to be proximate in some descriptions of torts which in other connections would be considered to be remote). "One is baffled in the attempt to define and delimit the conception of proximate cause as worked out in particular torts, no less than in the entire field of tort." *Ibid.* 111.

"This subject is involved in obscurity greater perhaps than hangs about any other head of the law, and it is exceedingly difficult, if not quite impossible, to extract from the authorities any clear and definite general principles. . . . After much reflection I have not succeeded in coming to any view that seems to me free from difficulties. I shall not therefore in this place attempt to deduce from the authorities a systematic and complete statement of the existing law, but rather to analyze the various conceptions used, show wherein some generally accredited rules are open to exception, and present certain suggestions as to what the true underlying principles are." Terry, *Leading Principles of Anglo-American Law*, § 545.

In saying that the consequences "must not be too remote," the courts are "laying down a condition . . . which cannot possibly be reduced to rule. . . ." "It is a question of *degree*, dependent upon the circumstances of each particular case; . . ." E. C. Clark, *Analysis of Criminal Liability*, 17.

" . . . no general rule can be laid down by reference to which the question, whether in any particular case the damage sought to be recovered is too remote, can be determined. Whether it is, or is not, too remote is a question of fact depending on all the circumstances of the case. . . ." (The learned authors add: "but although a question of fact it is one for the Court to determine.") Clerk & Lindsell, *Torts*, 5 ed., 146.

Any universal precepts which might be formulated "would be indefinite and un-

If the learned writers just quoted in the note mean only that no minutely specific rule can be laid down whereby all questions of causation can be instantly solved, they are undoubtedly correct. But it does not follow that it is impossible to lay down a general rule, which, although confessedly imperfect, is nevertheless better than any of the tests hitherto in common use.²⁰

Probably no definition, or test, of legal cause can be given which will not be open to some objections. But it is desirable that *some* definition should be given, and the question is which definition is least objectionable. In framing a definition on any legal topic there is always danger of going to one of two opposite extremes. One is, making a statement in such vague and general terms as to be practically useless. The other is, attempting by a series of minute tests to lay down special rules whereby it will be practicable to decide instantly each case that may arise; an attempt not likely to succeed.

By way of rough approximation²¹ to a correct general rule, we suggest the following statement, which is in the nature of a fragment of a code on torts framed after the manner of the Indian Penal Code; *i. e.* giving first a general rule in broad terms, and then accompanying it with explanations (or subsidiary rules) and also with concrete illustrations.

Problem. — What constitutes such a relation of cause and effect (such a causal relation) between defendant's tort and plaintiff's damage as is sufficient to maintain an action of tort?

General Rule. — Defendant's tort must have been a substantial factor in producing the damage complained of.

satisfactory guides." Professor Bingham in 9 Col. L. Rev. 145; and see p. 144, note 23.

As to vagueness of general rules proposed, see 36 Am. St. Rep., note, pp. 811-812.

²⁰ Why should one attempt to define legal cause, if he does not himself believe his statements to be absolutely correct?

Answer: An attempt at definition, even if the statement is torn into shreds by critics, may have the effect of stimulating discussion upon this topic, which has hitherto received less attention at the hands of legal writers than almost any other subject of equal importance. Professor Maitland, we believe, has somewhere said, in substance, — that the putting forth of a "sharply wrong" rule may be serviceable by provoking inquiry which ultimately results in the bringing forth of a "sharply right" rule.

²¹ See Willard, Law of Personal Rights, 254.

Or, — To constitute such causal relation between defendant's tort and plaintiff's damage as will suffice to maintain an action of tort, the defendant's tort must have been a substantial factor in producing the damage complained of.²²

²² In regard to the words — "must have been a substantial factor in producing the damage complained of":

As to the ideas intended to be conveyed by "substantial," "factor," and "producing," various other expressions have been thought of, some of which are given below. If some of these substitutes are adopted, it might be desirable to change "have been" to "have had," or "have constituted," or "have contributed," or "have aided in."

Possible substitutes for "substantial": — Considerable. Important. Large. Material. Efficient. Continuously Efficient.

Possible substitutes for "factor": — Part (must have had a substantial part). Share. Element. Influence. Effect. Contribution. Ingredient.

Possible substitutes for "have been a substantial factor": — Materially contributed to. Substantially aided in.

Possible substitutes for "producing": — Subjecting plaintiff to. Exposing plaintiff to. Bringing about. Bringing to pass. (See *post*, Explanation 5, and Illustrations 5 and 7b.)

Possible substitute for the phrase "must have been a substantial factor in producing the damage complained of": — Must have been "an active and efficient factor in bringing about the result." See 1 Sedgwick, Damages, 9 ed., § 118. And compare § 112: "this cause must be active enough in the result for it to be regarded in the law as efficient in responsibility."

When the general rule is to be applied (as it often will be) by juries, it might, perhaps, be desirable to substitute "considerable" for "substantial"; and to substitute "part" for "factor." If an issue is submitted to a panel of jurymen in language which they all understand, they are very likely to arrive at a correct solution. But it is a not uncommon mistake in charging juries to use words the meaning of which may not be readily apprehended by some members of the panel. The great majority of jurors would fully understand the meaning of the word "factor" when used in the above connection; but this might not always be true of every member of the panel.

"Substantial" is not here meant to be understood as expressing merely the idea of "actual," as opposed to "nominal." It is meant to be understood as expressing the idea of "considerable" or "of some magnitude," in antithesis to "trifling," "slight," "trivial" or "minute." This notion of "considerable" is the idea sometimes (though it may not be always) conveyed by the word "substantial" in the statement, that, in order to maintain an action for certain kinds of "nuisance," the damage must be "substantial." See *Rushmer v. Polsue*, [1906] 1 Ch. 234, Warrington, J., p. 237, *Cozens-Hardy, L. J.*, pp. 250, 251; *Lord Selborne in Gaunt v. Fynney*, L. R. 8 Ch. 8, 12 (1872); *Salmond, Torts*, 1 ed., 184-187.

The objection of vagueness, in the terms used in the general rule, will be discussed later. But, as to the possibility of defining the exact magnitude of the influence which must be exerted by defendant's tort, it may here be suggested that writers on criminal law are confronted by a similar difficulty in defining the magnitude of the act required to constitute the crime of "attempt" and that the highest authority has said: "How great it must be, . . . is matter not reducible to exact rule." 1 *Bishop, New Criminal Law*, § 759, paragraph 1.

There are two phrases, one or the other of which would have been used by many

EXPLANATIONS OR SUBSIDIARY RULES.

Explanation 1. "A substantial factor." Not the only causative antecedent, nor the predominant causative antecedent, nor the sum of all the causative antecedents. Not the sole factor, nor the predominant factor. Enough if it is a substantial part of the causative antecedents; if it is one of several substantial factors. See *post*, Illustration 1.

Explanation 2. "A substantial factor," "in producing the damage," etc. These words should be understood as involving the idea of "continuous efficiency." This means that the *effect* of defendant's tort must have appreciably continued; either down to the very moment of damage; or, at least, down to the setting in motion of the final active injurious force which immediately produced (or preceded) the damage. In this sense, defendant's tort must continue to be "a practically active cause."²³ But this does not mean that any *force* which was a direct and immediate consequence of defendant's tort, *i. e.* any force which began to operate immediately upon the commission of the defendant's tort, must have continued in active motion up to the moment of the damage. See, *post*, Illustrations 2*a* and 2*b*.²⁴

lawyers in framing a general rule. One is, "an efficient cause." In defining "legal cause," we thought it desirable to avoid using the word "cause" itself. The other is, "materially contributed" to the result. See replication in *Byrne v. Wilson*, 15 Ir. C. L. 332 (1862). The ambiguity of the word "contributed" has occasioned much difficulty in the discussion of "contributory negligence." It may mean, contributed as a part of the legal cause. Or it may mean, contributed as a remote and non-causative antecedent. See the opinion of Lord Penzance in *Radley v. London, etc. Ry. Co.*, 1 App. Cas. 754, 759 (1876), where the word is used in one sentence in one meaning, and in the next sentence in an entirely different meaning.

We may as well notice here the possible objection, that the phraseology of the General Rule would literally apply only to affirmative tortious conduct, and would not include cases of negligence. It is true that, in actions for negligence, the conduct of the defendant immediately preceding the happening of the damage may be alleged to consist in omitting to prevent the accident. But, in almost all cases of actionable negligence, the defendant has, prior to the time of the alleged omission, done certain affirmative acts which imposed upon him the duty of care. Negligence, upon a broad view of the whole case, generally involves careless doing rather than mere not doing. See Professor Wigmore in 8 HARV. L. REV. 386, note 2; Pollock, Torts, 6 ed., 417-418; O'Neal v. Grizzle, 124 Ga. 735, 53 S. E. 244 (1906).

²³ See 1 Sedgwick, Damages, 9 ed., § 115*a*.

²⁴ Some logicians draw a sharp distinction between (1) causative motion which induces an immediate change in the position of a material object and (2) the subsequent continuance of that object in the position where such motion has placed it. If B. overthrows a material object by the motion of his arm, it is admitted that B. acts as a cause in producing the change of position. But it is said that, by the change which has thus taken place, "the causation is exhausted, even though the effect, the state brought about by the change, persists"; . . . "only the effect persists, not the causation." See 2 Sigwart, Logic, Dendy's Transl., 95. But whatever may be the correct view from the standpoint of logic, courts often hold B. liable where the continuance of the object in the position where his movement placed it is a substantial factor in sub-

Explanation 3. A defendant's tort cannot be considered a legal cause of plaintiff's damage, if that damage would have occurred just the same even though the defendant's tort had not been committed. See *post*, Illustrations 3*a* and 3*b*. *Exception.* Where two tortfeasors are simultaneously operating independently of each other, and the separate tortious act of each is sufficient in and of itself to produce the damaging result.²⁵

Explanation 4. The fact that the damage would not have happened "but for" the commission of defendant's tort, does not, as a matter of law, necessitate the conclusion that defendant's tort was a legal cause of the damage. This fact is generally one of the indispensable elements to establish the existence of causal relation. But it is not the only requisite; it is not *per se* an all sufficient element. See *post*, Illustration 4.

Explanation 5. It is not necessary that the defendant's tort should have set in motion the final active injurious force which immediately preceded the infliction of the damage. It is enough if defendant's tort was a substantial element in subjecting plaintiff to suffer damage from the operation of that final force.²⁶ See *post*, Illustration 5. And compare Illustrations 7*a* and 7*b*, *post*.

Explanation 6. The fact that the final active injurious force consists of, or is set in motion by, the tortious act of a third person, who is not acting in concert with defendant, does not necessarily prevent defendant's tort from being regarded as a legal cause of the damage. See *post*, Illustration 6.

Explanation 7. The fact that the specific consequence complained of was unforeseen and unintended by defendant, and was improbable, does not necessarily prevent defendant's tort from being regarded as a legal cause of that consequence. See *post*, Illustrations 7*a* and 7*b*.

ILLUSTRATIONS.

Illustration 1. By a collision between two teams in a highway, plaintiff who was walking carefully across the street, suffered damage. The collision (and the consequent harm to plaintiff) was due to the simultaneous negligence of both drivers, and would not have occurred if only one had been negligent. The negligence of each driver was equal to that of the other in quality and in effect. In a suit by plaintiff against one of the drivers, the negligent act of the defendant is regarded as a legal cause of the harm to plaintiff.²⁷

Illustration 2a. By defendant's negligent management of a trolley car, jecting a plaintiff to damage. See *post*, Illustration 2*a*. Mr. Labatt says: "... if the abnormal conditions created by the defendant's act are found to have continued up to the time when the injury was received, and to be, in a physical sense, constituent factors of the total sum of incidents which make up the injury, the defendant should in justice be required to make good the damage done." 33 Can. L. J. 721.

²⁵ As to this exception, see *ante*, 25 HARV. L. REV. 109, n. 20; also Watson, Damages for Personal Injuries, §§ 60-64, and § 43; *Corey v. Havener*, 182 Mass. 250, 65 N. E. 69 (1902).

²⁶ Hence the expression "subjecting plaintiff to the damage" seems preferable to the ordinary phrase "producing the damage."

²⁷ See *Mathews v. London Street Tramways Co.*, 60 L. T. Rep. n.s. 47 (1888) (a case differing in specific facts from the above illustration).

plaintiff, a passenger, is thrown flat upon the highway. Before he has time to rise, he is there negligently run over by a wagon. Defendant's negligent management of the trolley car is a legal cause of the harm done to the plaintiff by the wagon passing over him.²⁸

Illustration 2b. Defendant negligently sells gunpowder to a very young boy, who is evidently incapable of safely using or taking care of it. When the boy reaches home his father takes the powder from him and locks it up in a closet. Next day the father gives the powder to the boy, who throws it into the street and there sets it on fire, causing an explosion whereby plaintiff is hurt. Defendant's negligence in selling the powder to the boy is not a legal cause of the harm suffered by plaintiff.²⁹

Illustration 3a. Defendant cut ice from a lake near a highway, and did not put up around the open space such fence guards as were required by statute. Plaintiff's horses escaped from the control of their driver, ran rapidly into the opening, and were drowned. If the fright and speed of the horses were such that they would have run into the opening even if it had been properly guarded, then the failure of the defendant to erect proper guards is not a legal cause of the drowning of the horses.³⁰

Illustration 3b. A. strikes B., who is at the time so ill that she could not possibly have lived more than six weeks if she had not been struck. In consequence of the blow, B. dies earlier than she would otherwise have died. A.'s blow is the legal cause of the death of B.³¹

Illustration 4. A belt in a machine shop was broken by the negligence of defendant, the owner of the shop. Plaintiff undertook to mend the belt, and while doing so met with an accident for which defendant was not to blame. Plaintiff would not have attempted to mend the belt and would not have been hurt, if the belt had not previously been broken. Defendant's fault, which occasioned the breaking of the belt, is not a legal cause of the harm suffered by plaintiff while mending the break.³²

Illustration 5. Defendant navigates his ship so negligently that it strikes upon a shoal and becomes unmanageable and entirely beyond control. While in this condition, the ship is carried by the wind and tide against a sea wall of the plaintiff, damaging the wall. Defendant's fault in allowing the ship to become uncontrollable is a legal cause of the damage to the plaintiff's sea wall.³³

Illustration 6. Defendant negligently left in the highway a truck loaded with iron, so placed on the truck that the iron would easily fall off. A third person wrongfully moved the truck, thereby unintentionally causing the iron to roll off and to hit the plaintiff. Damage of this kind might have been reasonably foreseen as a not unlikely consequence of leaving the truck in the highway. Defendant's fault in leaving the truck in the highway is a legal cause of the harm to the plaintiff.³⁴

²⁸ Adapted from *Fine v. Interurban Street Ry. Co.*, 45 N. Y. Misc. 587, 91 N. Y. Supp. 43 (1904).

²⁹ Adapted from *Carter v. Towne*, 103 Mass. 507 (1870). Compare *Pittsburg*, etc. *Co. v. Horton*, 87 Ark. 576, 113 S. W. 647 (1908).

³⁰ *Sowles v. Moore*, 65 Vt. 322, 26 Atl. 629 (1893).

³¹ Substance of *Illustration (5)*, Stephen, *Digest of Criminal Law*, 6 ed., 179, citing *R. v. Fletcher*, 1 Russ., Crimes, 4 ed., 703, 7 ed., 692 (1841). For a recent decision see *McCahill v. New York Transportation Co.*, 201 N. Y. 221, 94 N. E. 617 (1911). Compare 2 *Bishop*, *New Criminal Law*, § 638, paragraph 3.

³² *Schultz v. Eckardt Mfg. Co.*, 112 La. 568, 36 So. 593 (1904). See Lord Dunedin in *Dunnigan v. Cavan & Lind Mfg. Co.*, 48 Scot. L. R. 459, 461 (1911).

³³ *Bailiffs of Romney Marsh v. Trinity House*, L. R. 5 Exch. 204, (1870).

³⁴ *Lane v. Atlantic Works*, 111 Mass. 136 (1872).

Illustration 7a. Defendant, by fraudulent representation, induced plaintiff to refrain from selling shares in a certain corporation. While plaintiff was acting under this inducement in continuing to hold the stock, an officer of the corporation embezzled most of its funds, thereby greatly diminishing the value of the stock. Plaintiff thereafter sold his stock at a great reduction from its value at the date of the fraudulent representation. Neither plaintiff nor defendant foresaw, or had probable ground to foresee, this embezzlement. Defendant's fraudulent representation is a legal cause of the loss sustained by plaintiff.³⁵

Illustration 7b. Plaintiff went to defendant's warehouse and demanded his goods which were there deposited. Defendant, by reason of his negligent failure to investigate, denied that the goods were there. Hence plaintiff went away without the goods. On the following night the goods in the warehouse were consumed by an accidental fire for which defendant was not to blame. Defendant's negligent failure to deliver the goods was a legal cause of the destruction of the goods.³⁶

Assuming the "fragment of a code on torts" to have been enacted in the foregoing form, with the accompanying explanations and illustrations, what use should be made of it; how should it be applied upon the trial of a case?

The judge, in charging the jury, should always state the general rule as the principal rule of law relating to causation. As to the explanations, or subsidiary rules, he should state such, and only such, as may be applicable to the facts of the particular case. Probably no one case would call for the application of all seven of these explanations. Whenever the judge states any one of these explanations, he should make it clear that he is not substituting the explan-

³⁵ Fottler v. Moseley, 185 Mass. 563, 70 N. E. 1040 (1904).

³⁶ Railroad v. Kelly, 91 Tenn. 699, 20 S. W. 312 (1892); Stevens v. B. & M. R., 1 Gray (Mass.) 277 (1854). See this case stated in Appendix.

If it is desired that the rule or requisites of causal relation should be stated without the addition of any explanations or illustrations, the following formulæ are suggested:

There are two requisites:

1. (Generally) — That the damage would not have occurred just the same, if defendant's tort had not been committed.

2. Defendant's tort must have been a substantial and continuously effective factor in subjecting plaintiff to the damage.

Or, in other words:

1. Defendant's tort must be one of a series of antecedent events, without which the damage would not have happened.

2. It must not only be an antecedent, but also a causative antecedent; *i. e.* an antecedent having a substantial and continuously efficient share in producing the damage.

The two requisites might be stated more briefly by employing two Latin phrases:

1. Defendant's tort must be a *causa sine qua non*.

2. It must also be a *causa causans*.

But this does not tell us what are the essential elements to constitute a *causa causans*.

ation for the general rule, but is only trying to make it easier for the jury to understand the general rule and to apply it to the facts of the particular case. The explanations and illustrations are not intended to replace the general rule, but to illuminate it.³⁷

As to the number of explanations or subsidiary rules: If seven, why not seventy or seven hundred? Why not state in detail the concrete point decided in every reported case which has arisen upon the subject of legal cause?

Because our present purpose is, not to make a digest of all the decisions, but to bring out the most important elementary principles underlying those decisions. The decisions contain the rough material from which the leading principles are to be evolved; but a detailed statement of each separate decision is not equivalent to a statement of the leading principles. It would not give the resultant force of all the decisions taken together.

It may be inexpedient to state general principles without adding any explanations or subsidiary rules. But it is not desirable to attempt to add subsidiary rules sufficiently numerous and sufficiently minute to point out unerringly the exact decision in every conceivable specific case. Even if sub-rules could be stated that would thus cover the whole ground definitely, "they would be very complicated, full of fine distinctions and hard to apply in practice."³⁸ Professor Terry correctly says that it "would be one of the most delicate problems of the whole work of codification" to decide "how far it would be wise to go in laying down subrules and specifications under general principles."³⁹

If we have erred on this point in the present article, we think the error is on the side of fulness. Explanations 2, 5, and 6 are of less relative importance than Explanations 1, 3, 4, and 7. It might have been better to omit 2, 5, and 6. There is always the danger of over-definition. Sir J. F. Stephen⁴⁰ thinks it a mistake, in fram-

³⁷ See Chailley, *Administrative Problems of British India*, 361.

³⁸ See language used in reference to another topic in Terry, *Leading Principles of Anglo-American Law*, § 581.

³⁹ Terry, *Leading Principles of Anglo-American Law*, § 610. Compare Willard, *Law of Personal Right*, § 236. "Hugo's objection proceeds on the mistake of supposing that a Code must provide for every possible concrete case. But this (as I have shown already) is what no law (statute or written) can possibly accomplish. It would be endless." 2 Austin, *Jurisprudence*, 3 ed., 687.

⁴⁰ 3 Stephen, *History of Criminal Law*, 306.

ing a code, "to try to anticipate captious objections." He says:

"... over-definition for that purpose is like the attempt to rid a house of dust by mere sweeping. You make more dust than you remove. If too fine a point is put upon language you suggest a still greater refinement in quibbling."

As to objections which may be urged against the general rule which we have suggested:⁴¹

⁴¹ Before considering objections to the tests just stated in the "fragment of a code on torts," it may be useful to see how far those tests differ from the views expressed in the important opinion of Wardlaw, J., in *Harrison v. Berkley*, 1 Strob. L. (S. C.) 525 (1847), one of the earliest and ablest of the opinions which reject the alleged rule of non-liability for improbable consequences.

Judge Wardlaw, in his *dicta* in that case, practically lays down two rules:

1. A wrongdoer is liable, at all events, for probable consequences.
2. He is also liable for such improbable consequences as are both proximate and natural.

The crucial sentence in Judge Wardlaw's definition of "proximate" is:

"Such nearness in the order of events, and closeness in the relation of cause and effect, must subsist, that the influence of the injurious act may predominate over that of other causes, and shall concur to produce the consequences, or may be traced in those causes." At p. 549.

Judge Wardlaw's definition of "natural" is:

"By this, I understand, not that they should be such as upon the calculation of chances would be found likely to occur, nor such as extreme prudence might anticipate, but only that they should be such as have actually ensued one from another, without the occurrence of any such extraordinary conjuncture of circumstances, or the intervention of any such extraordinary result, as that the usual course of nature should seem to have been departed from." At p. 549.

In condensed form: Events occurring without extraordinary departure from the usual course of nature, though not reasonably to have been anticipated. For another definition of "natural and proximate," see Trenchard, J., in *Smith v. Public Service Corporation*, 78 N. J. L. 478, 480, 75 Atl. 937, 938 (1910).

Both terms, "proximate" and "natural," are infelicitous. "Proximate" is often used as synonymous with "legal cause" (and might be understood as making nearness in time or space an essential element). "Natural" is frequently used in the sense of "probable." Neither term is used by Judge Wardlaw in these common significations.

We differ from Judge Wardlaw in two respects:

1. We do not think that a defendant should always be exonerated where there was an extraordinary and unforeseeable departure from the usual course of nature. As to this point the opinion of the court in the representative case of *Green-Wheeler Shoe Co. v. Chicago, R. I. & Pac. R. Co.*, 130 Ia. 123, 106 N. W. 498 (1906), seems preferable to the opinion in *Rodgers v. Missouri Pac. Ry. Co.*, 75 Kan. 222, 88 Pac. 885 (1907). See, *post*, discussion in Appendix.

2. We do not think it essential that the defendant's act should predominate over other causes. (See, however, in support of Judge Wardlaw, *Biggs, J.*, in *Pierce v. Michel*,

It will perhaps be admitted by some that our general rule is well enough as far as it goes; but it will be contended that it ought to go farther and give more minute and specific tests. Probably it will be chiefly objected to on the ground of vagueness. But the question of causative relation is in reality one of fact and degree; and all attempts hitherto made at laying down universal tests of a more definite and more specific nature have resulted in propounding rules which are demonstrably erroneous.

"Four or five rules have been proposed, discussed, and found inadequate; all of them, in difficult cases, fail even to guide a jury, and no one has prevailed over the others."⁴²

"Several rules of liability have been prescribed, only to be shattered by novel accidents, thus demonstrating that the mind is unable to conjecture all the harmful results which may flow from a delinquent act and flow from it in such natural sequence that, on a presented case, it can be pronounced the wrongdoer was to blame."⁴³

It is not believed that any minute and elaborate tests would "bear the strain of individual cases in the course of experience." The only way to prevent such tests from sometimes operating unjustly would be by giving an unnatural and forced construction to their language, or by creating arbitrary exceptions and qualifications.

Is not this the difficulty with some definitions of legal cause (some statements of the requisites to the existence of causal relation), namely: That the framers of the definitions are aiming at "the ideal of a logical and methodical exactness" greater than the subject permits of?⁴⁴

60 Mo. App. 187, 191 (1895); 1 Sutherland, Damages, 3 ed., § 16.) The defendant's tort need not have "contributed" to the damage more largely than any other cause. It is enough if it substantially "contributed"; if it constituted one of the substantial factors in subjecting plaintiff to the damage.

Suppose that damage results from the simultaneous concurrent acts of two independent wrongdoers; the tort of each having the same causative force as that of the other; *i. e.* each constituting one half of the compound cause. If the "predominant" test is insisted upon, how could either be held liable? Would not both escape?

Moreover, would it not often be difficult to determine the question of predominance? "What among many essential causes can be said to predominate or be exclusively efficient?" See 9 Col. L. Rev. 144, note 23.

⁴² Professor Beale in 9 HARV. L. REV. 80.

⁴³ Goode, J., in *Lawrence v. Heidbreder Ice Co.*, 119 Mo. App. 316, 330, 93 S. W. 897, 900 (1906).

⁴⁴ If exact definition is here found unattainable, this will not be the only legal topic

Attempts have been made to discover (what has been assumed to exist) a form of words termed a test of causal relation, "which, put into the hands of jurors, can be used by them as a sort of legal yardstick to measure the evidence" and to determine, instantly and with mathematical exactness, whether or not the defendant's tort caused the plaintiff's damage. But a test possessing these qualities (a test with such potentiality) has never been found; "not because those who have searched for it have not been able and diligent, but because it does not exist."⁴⁵

It is often difficult to determine whether the defendant's tort was the cause of the plaintiff's damage; but this difficulty arises "from the nature of the facts to be investigated." It is a practical difficulty "to be solved by the jury," and not a legal difficulty for the court.⁴⁶

in such a predicament. As to the subject of "attempt" in criminal law, high authorities declare it impossible to give an exact definition or generalization in regard to the so-called "proximateness" of an act.

Sir J. F. Stephen in 2 *History of Criminal Law of England*, 224, says: "The law as to what amounts to an attempt is of necessity vague. It has been said in various forms that the act must be closely connected with the actual commission of the offense, but no distinct line upon the subject has been or as I should suppose can be drawn." The same author, in his *Digest of Criminal Law*, 1 Am. ed., Art. 49, after defining attempt as "an act done with intent," etc., "and forming part of a series of acts which," etc., says: "The point at which such a series of acts begins cannot be defined; but depends upon the circumstances of each particular case."

So Dr. Bishop in 1 *New Criminal Law*, § 759, paragraph 1, says: "An attempt may be too small a thing, or proceed not near enough to its accomplishment, for the law to notice. How great it must be, and how far progress, is matter not reducible to exact rule." See also 1 *Bishop, New Criminal Law*, § 762, paragraph 4; and compare *Holmes, J., in Commonwealth v. Kennedy*, 170 Mass. 18, 22, 48 N. E. 770, 771 (1897).

And Dr. Kenny in *Outlines of Criminal Law*, Webb's Am. ed., 73, says: "It seems impossible to lay down any abstract test for determining whether an act is sufficiently proximate to be an 'attempt.'"

For another instance of admitted vagueness, see Professor Maitland's comment on his own definition of "trust." He said: "It is a wide vague definition, but the best that I can make." Maitland, *Lectures on Equity*, 44.

Sir J. F. Stephen said of a certain statutory definition: "I do not think it happy, as it attempts to define what is essentially indefinite." 3 *Stephen, History of Criminal Law*, 316.

⁴⁵ This phraseology is largely borrowed from Dr. Bishop's discussion as to "Test of Insanity," 1 *Bishop, New Criminal Law*, § 381.

⁴⁶ See dissenting opinion of Doe, J., upon another topic, in *State v. Pike*, 49 N. H. 399, 438 (1870). See also *New York, etc. R. v. Estill*, 147 U. S. 591, 613, 13 Sup. Ct. 444, 453 (1892). The difficulty lies "in ascertaining the facts, and not in applying law to them." 3 *Stephen, History of Criminal Law*, 6.

"The question whether an item of loss is or is not a proximate consequence of the wrong is in each case a question of fact. Only general principles can be laid down, and in applying them much latitude must necessarily be left to the court and jury. If the case is a clear one, the court will direct the jury upon the question; but if the question is a doubtful one it will be left to the jury." (After giving instances where certain consequences were held proximate and others remote.) "An entirely harmonious course of decision on such a question is not expected. As the determination is really one of fact, under proper directions, and ordinarily for the jury, the decision may simply be the result of the court's upholding the right of the jury to decide one way or the other; and even if the court itself determine the question, as is not infrequent in practice, it is nevertheless natural to expect differences of opinion upon what are really close questions of fact."⁴⁷

It may be urged in favor of laying down minute legal tests of causation that, in the absence of such tests, a defendant cannot foretell in advance the extent of the liability he is incurring. But what principle of justice requires the law to furnish him such information?⁴⁸ As to the standard of conduct, *e. g.* as to what conduct shall be deemed negligent, there is more room for the argument that a defendant ought to know what actions the law forbids, and thus be able to keep within legal bounds. But here, *ex hypothesi*, the defendant has been guilty of wrongful conduct; he has exceeded the legal limit, and the only remaining question is as to the extent of his liability, *i. e.* as to the existence of causal relation between the defendant's fault and the plaintiff's damage.⁴⁹

Suppose that, in establishing a general rule upon this subject of causation in actions of tort, we are confined to a choice between two tests: First, the rule of liability for probable consequences only; second, the "General Rule" we have suggested ("defendant's

⁴⁷ 1. Sedgwick, Damages, 9 ed., §§ 116, 117.

⁴⁸ See *ante*, 25 HARV. L. REV. 248-249; reply to argument founded on hardship.

⁴⁹ *France v. Gaudet*, L. R. 6 Q. B. 199 (1871), was an action for conversion. At the time of the conversion, a special value was attached by special circumstances to the goods converted. Although these special circumstances were not known to the defendant, he was nevertheless held liable for the full actual value fixed by these circumstances. Mellor, J., said, on page 205, ". . . no notice to the wrongdoer could then affect the value, although it might affect his conduct; but upon what principle is a notice necessary to a man who *ex hypothesi* is a wrongdoer?"

tort must have been a substantial factor in subjecting plaintiff to the damage complained of").

If either of these tests is adopted as an exclusive general rule to be applied in all cases, it is likely that practical injustice will occasionally result. Under the first test recovery may sometimes be unjustly denied. Under the second test, recovery may sometimes be unjustly permitted. If injustice will appreciably result more frequently under one of these tests than under the other, then the test under which this happens should be discarded. Neither logic, nor legal symmetry, furnish conclusive reasons for adopting a rule of law. The decisive consideration is that furnished by experience — the practical working of a rule.⁵⁰

Our own impression is that practical injustice would result more frequently from the operation of the first test than from the second. Hence we should reject the first test; and, if we are compelled to choose one of the two, we should adopt the second test.

Suppose, however, that there is no difference between the two tests as to practical injustice. Suppose that the number of unjust results from the application of one test will be exactly equal to the number under the other test. Under the one test, there will be the risk that a recovery may occasionally be unjustly denied to the plaintiff. Under the other test, there will be the risk that, in an equal number of instances, a recovery may be unjustly allowed against the defendant. Whichever test then is adopted, one party or the other has got to run a risk of occasional injustice. Upon which of the two parties ought this risk to be imposed: Upon the innocent plaintiff or the tortious defendant? In the words of Judge Christiancy in *Allison v. Chandler*:⁵¹

"... does not sound policy require that the risk should be thrown upon the wrongdoer instead of the injured party?" "The nature of the case is such as the wrongdoer has chosen to make it; and, upon every principle of justice, *he* is the party who should be made to sustain all the risk of loss which may arise from the uncertainty pertaining to the

⁵⁰ "But as the law is a practical science, having to do with the affairs of life, any rule is unwise if, in its general application, it will not, as a usual result, serve the purposes of justice." Allen, J., in *Spade v. Lynn & Boston R. Co.*, 168 Mass. 285, 288, 47 N. E. 88, 89 (1897). "The life of the law has not been logic: it has been experience." Holmes, *The Common Law*, 1. See 11 HARV. L. REV. 439; 14 HARV. L. REV. 195.

⁵¹ 11 Mich. 542, 553-556 (1863).

nature of the case, and the difficulty of accurately estimating the results of his own wrongful act. Upon what principle of right can courts of justice assume — not simply to divide this risk, which would be thus far unjust — but to relieve the wrongdoer from it entirely, and throw the *whole* upon the innocent and injured party ?”⁵²

Jeremiah Smith.

CAMBRIDGE, MASS.

APPENDIX.

There are two classes of cases which have occasioned great difficulty. It has sometimes been supposed that, if it is laid down as a general rule that the improbability of a result does not *per se* exonerate a wrongdoer, then these cases must constitute exceptions to such a rule. In the foregoing general discussion very little consideration has been given to these classes. It is proposed now to deal with them more fully.

These classes of cases are:

1. Where, although defendant was in fault, yet no damage would have resulted but for an occurrence in the natural world, which constituted an extraordinary departure from the usual course of nature.

2. Where defendant's conduct was wrongful, but no harm would have resulted had it not been for the unforeseeable intervention of an independent wrongdoer.

As to 1, there is a remarkable conflict of authority. Some courts would order a verdict for the defendant, and others for the plaintiff.

As to 2, the weight of authority is in favor of exonerating the defendant; but it may be found upon examination that some cases of this description present a question for the jury.

As to the first class, the arguments *pro* and *con* are brought out, and authorities are collected, in the conflicting decisions in two recent cases; namely, *Green-Wheeler*

⁵² The frequent references to Professor Terry's book, *Leading Principles of Anglo-American Law*, and to Professor Bohlen's articles in legal periodicals, hardly represent the full extent of the present writer's obligations to these learned authors; neither of whom, of course, can be held responsible for the ultimate conclusions here reached.

Professor Terry's book, published in 1884, though cited by such jurists as Sir Frederick Pollock and Professor Wigmore, is not often referred to in the reports either by counsel or judges. The work contains a good deal of valuable matter not to be found elsewhere. The learned author never evades a difficulty. He seldom fails to state the crucial issues upon each topic discussed; though he sometimes frankly confesses his inability to arrive at a satisfactory solution. A reader can derive great benefit from this book, even if he does not agree with all the author's theories or adopt all his phraseology.

Professor Bohlen's essays on various legal subjects, in the *American Law Register*, the *University of Pennsylvania Law Review*, and the *HARVARD LAW REVIEW*, are of great value. He lets in light upon every subject which he discusses. It is hoped that a volume may soon be published containing a full collection of all Professor Bohlen's articles in legal periodicals.

Shoe Co. v. Chicago, R. I. & Pac. R. Co., 130 Ia. 123, 106 N. W. 498 (1906), and Rodgers v. Missouri Pac. Ry. Co., 75 Kan. 222, 88 Pac. 885 (1907).

Precise question presented by the Green-Wheeler case: A common carrier negligently delays goods *in transitu*. While he is so delaying and the goods are still in his custody, the goods are destroyed by a flood, which was greater than ever before known and could not have been reasonably anticipated (in legal phraseology, "an act of God"). If the goods had been promptly carried to their destination, they would have escaped the flood. Is the carrier liable for the value of the goods?

The Rodgers case differs from the Green-Wheeler case as to one matter of fact. In the Rodgers case the goods were no longer in transit when overtaken by the flood. They were at the railroad terminus, but had not been delivered to the consignee. But for the original delay in starting the goods on their transit, the goods would have reached the terminus so early that they would have been delivered to the consignee before the flood, and would thus have escaped destruction.

On the above general question there is a remarkable conflict of authority. We are inclined to agree with the Iowa result, and to dissent from the Kansas result.

The carrier is a wrongdoer, the only wrongdoer in the chain of antecedents. And, but for his wrong, the damage would not have happened. Both these circumstances combined do not, as *matter of law*, make out that his tort was the legal cause, or one of the concurring causes. But these two circumstances are competent to be considered *on the question of fact*, and go far to justify a finding of causal relation. It would seem that a jury might reasonably find that the effect of defendant's negligence appreciably continued down to the time of destruction, and that it constituted a substantial factor in subjecting plaintiff to the loss. It may be urged that "the carrier's delay did not produce the flood"; but this is true of the usual operations of nature, where a defendant is liable if his tort concurred therewith in bringing about damage. The workings of nature constitute the surroundings for all human acts; no man is excused simply because he did not create natural events, such as the blowing of the wind, or the flowing of the tide, in the Romney Marsh case, L. R. 5 Exch. 204 (1870); or the coldness of the atmosphere in Harrison v. Berkley, 1 Strob. L. (S. C.) 525 (1847); or in Fox v. B. & M. R. Co., 148 Mass. 220, 19 N. E. 222 (1889). See 1 Beven, Negligence, 3 ed., 80.

In the case now under consideration, while the defendant's negligent delay did not cause the flood, yet it did in fact subject plaintiff's property to the operation of the flood.

"This consideration that the peril of accidental destruction is enhanced by the negligent extension of time during which the goods must remain in the carrier's control and out of the control of the owner, and during which some casualty may overtake them, has not, we think, been given sufficient consideration in the cases in which the carrier has been held not responsible for a loss for which he is not primarily liable, but which has overtaken the goods as a consequence of the preceding delay in their transportation." McClain, C. J., in Green-Wheeler Shoe Company v. Chicago, R. I. & Pac. R. Co., 130 Ia. 123, 129, 106 N. W. 498, 500 (1906).

The right of a railroad company to transport explosives in its freight cars "does not include the right to subject persons along the route to dangers from explosions for a longer time . . . than is reasonably necessary to the performance of the carrier's duty." . . . "If, therefore, the car was unnecessarily and unreasonably delayed at the place where it exploded, so as to subject plaintiff's property to such dangers for a longer time than would have attended a transportation made with reasonable dispatch, such keeping of the car at that place was a nuisance." Williams, J., in Fort Worth, etc. Ry. Co. v. Beauchamp, 95 Tex. 496, 500, 68 S. W. 502, 504 (1902). The danger

that property may be destroyed by occurrences which would constitute an extraordinary departure from the usual course of nature is sometimes regarded as such an appreciable risk that it is insured against.

Somebody has got to bear the loss in this case. Should it be the innocent plaintiff, or the negligent defendant whose fault is potentially operative down to the time of loss?

That defendant could not have anticipated such a flood would be decisive in his favor, if plaintiff were relying on defendant's failure to take special precautions against the flood, as proof of his negligence. But here defendant's negligence is established on other grounds; namely, his delay; and the question is not whether his failure to anticipate the flood constitutes negligence, but whether his liability for the actual consequences of his admitted negligence should be restricted to such of those consequences as were foreseeable by him.

Suppose a carrier puts a covering over goods, sufficient to protect them from any rain that could reasonably be anticipated; and that, while he is carrying the goods with reasonable promptness, an entirely unprecedented rain occurs whereby the goods are ruined. The defendant is not liable for failing to provide a better covering. There is no tort on his part, no fault of his anywhere in the chain of antecedents. Hence, there is no question of causation. But how would it be, if the defendant was guilty of negligent delay in the carrying, and if such negligent delay exposed the goods to this extraordinary rain, which they would otherwise have escaped? Here the defendant is clearly in fault. The only question is one of causal relation. Is he to be exonerated from liability for the consequence of an admitted fault, because that consequence was not foreseeable by him?

Is there any limit to the enforcement of claims of this class? Can a consignee recover against a negligently delaying carrier for damage happening to goods a year after their delivery, upon the allegation that, but for the detention, the goods would have been sold and would not have been exposed to a cyclone twelve months later? Probably not. In general, a jury could not reasonably find that the effect of the delay appreciably continued so long and that the delay was a substantial factor in subjecting plaintiff to the loss. In cases not so extreme, the evidence may sometimes justify the submission of the question of fact to a jury; but no mathematical line can be drawn. The nearer the happening of the damage comes to the time of the defendant's delay, the more apt will the jury be to find a causative relation under our test. They are still more likely to find causative relation when the loss occurs during the delay and while the goods are still in the defendant's custody; but we do not regard either of these elements as legally essential to liability. (See, however, 1 Sedgwick, Damages, 9 ed., §§ 119*a* to 119*e*.)

Compare two decisions of the Massachusetts court: *Denny v. New York Central R. Co.*, 13 Gray 481 (1859); and *Stevens v. B. & M. R. Co.*, 1 Gray 277 (1854).

The *Denny* case is somewhat like the *Rodgers* case; and the defendant was held not liable.

In the *Stevens* case, the goods had arrived at the place of destination, and were in the railroad freight depot. The consignee sent a teamster to remove the goods. The railroad freight agent negligently believed that the goods were not there, and negligently told the teamster so. Hence the teamster went away without the goods. The goods, remaining in the freight depot, were destroyed by an accidental fire during the following night. Under the law of Massachusetts, a fire occurring without fault of the railroad would not *per se* make the railroad liable. *Norway Plains Co. v. B. & M. R. Co.*, 1 Gray (Mass.) 260 (1854). *Held*, that the railroad was liable for the value of the goods. *Shaw, C. J.*, said, at pp. 281-282: "... we think that, as the negligence

of the agent of the corporation in this case prevented the plaintiffs from getting their goods into their own possession on Monday afternoon, by means whereof they remained in the depot and were burnt, the loss was so directly the consequence of this default on the part of the corporation that the value of the goods . . . is the just rule of damages."

The Stevens case has come up (substantially) in several jurisdictions, and the weight of authority is with the decision in 1 Gray 277. See *Railroad v. Kelly*, 91 Tenn. 699, 20 S. W. 312 (1892), and *Central Trust Co. v. East Tennessee, etc. Ry. Co.*, 70 Fed. 764 (1895).

How can we reconcile the Stevens case with the Denny case or the Rodgers case?

The negligent misstatement (and the leaving the goods in the depot) had no tendency to cause the fire, but merely exposed the goods to the fire should it occur. There seems to have been no reason for anticipating that the fire would occur. Again, the defendant's conduct in both cases was simply negligent, not wilfully wrong. The delay in transportation in the Rodgers case was in one sense passive conduct, and the mistaken statement in the Stevens case was in one sense affirmative conduct; but the gist of the tort in each case is negligence.

It might be said that the existence of causal relation is a question of fact, and a question of degree, not determinable by definite rules; that in the Stevens case the defendant's fault is nearer in point of time to the happening of the damage; and that the defendant's fault is more obviously a substantial factor (potentially operative) in the damaging result. But if the results in these cases cannot be reconciled, we think it does not follow that the Stevens case is wrong. We prefer the other alternative, that the Rodgers case is wrong.

In 18 Yale L. J. 340-342, Mr. Larremore, if we understand him rightly, concedes that, under the established legal doctrine ("under existing abstract rules") as to causation, a decision like that in the Rodgers case is logically sound. But he believes the result to be practically unjust; and hence thinks the court should establish, for such cases, "a direct exception" to the established "theory of proximate and remote causes." If Mr. Larremore would follow Mr. Beven and Professor Bohlen, he would find a better way. The Rodgers case and its fellows all proceed upon the idea that there is an arbitrary rule of law, that a tortfeasor is not liable for improbable consequences. Mr. Beven and Professor Bohlen deny the existence of such a rule; and we think that they are right.

The foregoing reasoning would tend to establish the liability of a carrier, who was not "a common carrier." If the defendant is "a common carrier," the argument against him is still stronger. Such a defendant, in setting up the plea that the damage was due to the act of God, is claiming the benefit of an exception to the stringent general rule as to a common carrier's liability. But the benefit of this exception should be allowed only to those common carriers who are personally free from fault. It ought not to be allowed where the carrier's tortious delay exposed plaintiff's property to destruction by an extraordinary departure from the usual course of nature. See *Brown, J., in Bibb Broom Corn Co. v. Atchison, etc. R. Co.*, 94 Minn. 269, 275-276, 102 N. W. 709, 710-711 (1905).

As to the second class of cases, which it has sometimes been supposed must constitute an exception to a general rule that the improbability of a result does not *per se* exonerate a wrongdoer:

Class 2. Where defendant's conduct was wrongful, but no harm would have resulted had it not been for the unforeseeable intervention of an independent wrongdoer.

We have seen (*ante*, 25 HARV. L. REV. 118-119 *et seq.*) that there was formerly a tendency to hold that an earlier wrongdoer was never liable, though the intervention of the later wrongdoer was foreseeable. While this view prevailed, it would have been hopeless to contend that the earlier wrongdoer could ever be liable in case of non-foreseeable intervention. But now that this former view is generally abandoned, the question as to the possible liability of an earlier wrongdoer in case of non-foreseeable intervention is entitled to judicial consideration.

Suppose that, under our suggested rule of causation, the earlier tort is found as a fact to be in part the cause of the commission of the later tort, and thus in part the cause of the damage to the plaintiff which followed immediately upon the commission of the later tort. But suppose also that these consequences were not foreseeable (as probable) at the time of committing the earlier tort. Would the earlier tortfeasor be exonerated on that ground alone? We think not. The vital question is, whether the earlier, as well as the later, acts are "traceable by their substantial effects to the ultimate result which constitutes the injury." It may be that "such an entirely new form has been imparted by the later act to the abnormal conditions created by the earlier act, that it would be unjust to hold the author of the earlier act responsible for the final injury. But if no such metamorphosis has taken place, and if the injury is physically an actual result of a coöperation between the abnormal conditions created by both acts, either of the authors of those acts must, upon any rational principles, be regarded as responsible for a part of the injury" (though in measuring the amount of recovery "the law will not usually undertake to apportion the share of each, but will hold each liable for the whole"), "and it is idle to ask whether the later act was one which might have been anticipated. . . . The law should concern itself, not with the time at which an act is done, but with the question whether the act is still potentially operative for harm at the time the injury itself was inflicted." See Mr. Labatt, 33 Can. L. J. 720, 721. And these principles should govern (apply) even though the commission of the later tort was not induced directly or indirectly by defendant's earlier tort.

It has been said: ". . . if two distinct causes are successive and unrelated in their operation they cannot be concurring. One of them must then be the proximate, and the other the remote, cause." Williams, J., in *Kerr v. City of Lebanon*, 149 Pa. St. 222, 226-227, 24 Atl. 207, 208 (1892).

If "proximate" cause is here used in the sense of "legal" cause, the statement is erroneous, as implying that contiguity in space or nearness in time are legal tests of the existence of causal relation and that the antecedent which is nearest in space or time is invariably to be regarded as the sole legal cause. See *ante*, 25 HARV. L. REV. 107-108, comments on Bacon's Maxim.

Moreover, there are cases where "the original act of negligence, the primary causation, may be in its nature so continuous that the concurrent wrongful act precipitating the disaster will in law be regarded not as independent, but as conjoining with the original act to create the disastrous result." Henshaw, J., in *Merrill v. Los Angeles Gas & Electric Co.*, 158 Cal. 499, 505, 111 Pac. 534, 537 (1910), citing as one instance *Pastene v. Adams*, 49 Cal. 87 (1874).

If two causes are operating together and each is a substantial factor in producing the damage, "it is not necessary that the beginning of their operation should be simultaneous." See Bishop, *Non-Contract Law*, § 450. "So long as the act of the defendant still concurs with the new human act it remains a proximate cause of any further loss." 1 Sedgwick, *Damages*, 9 ed., § 126.

It has been said: ". . . directly the natural course of events is . . . accelerated . . . by any other impelling agency, that agency becomes the *causa proxima* and the

natural consequences of the original impelling agency are held to cease," unless the original wrongdoer ought to have known of the new cause and ought to have foreseen the probable result. Pigott, Torts, 166. But Professor Bohlen rightly says that the intervening agency, in order to be regarded in law as breaking the causal connection between the original wrong and the damage, "must divert, and not merely hasten, the natural effect of the wrong, . . ."; 40 Am. L. Reg. N. S. 163, citing *Elder v. Lykens Valley Coal Co.*, 157 Pa. St. 490, 27 Atl. 545 (1893). And see *Coleman, J., in Thompson v. L. & N. R. Co.*, 91 Ala. 496, 499-500, 8 So. 406, 407-408 (1890).

A part of the following passage from the opinion of Miller, J., in *Insurance Co. v. Tweed*, 7 Wall. (U. S.) 44, 52 (1868), has often been quoted in reference to this subject:

"One of the most valuable of the criteria furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote. In the present case we think there is no such new cause."

These *dicta* related to the construction of a clause in a contract of insurance, not to causal relation in actions of tort. "Some obscurity . . . has arisen from the attempt to draw analogies from insurance cases for application to cases that are governed by quite different principles." Terry, *Leading Principles of Anglo-American Law*, § 549. In actions on contracts of insurance there has been a tendency to hold that, for certain purposes as between the insured and the insurer, the cause nearest to and immediately preceding the loss is alone to be regarded. See Knowlton, C. J., in *Lynn Gas & Electric Co. v. Meriden Ins. Co.*, 158 Mass. 570, 576, 33 N. E. 690, 691 (1893). But "consequences may be proximate in actions for tort which would not be so if the question were of an underwriter's liability to pay for losses." Terry, *Leading Principles of Anglo-American Law*, § 549. Thus a shipmaster's negligence "may be a proximate cause of the loss in an action against him" (by his employer) "for neglect of duty and a remote cause in an action against the underwriter on the policy." Terry, *Leading Principles of Anglo-American Law*, § 543. "In an action on a policy the *causa proxima* is alone considered in ascertaining the cause of loss; but in cases of other contracts and in questions of torts the *causa causans* is by no means disregarded." Lord Lindley, in *Fenton v. Thorley & Co.*, [1903] A. C. 443, 454.

The phrase "of itself sufficient to stand as the cause of the misfortune" is ambiguous. See Terry, *Leading Principles of Anglo-American Law*, §§ 549, 558. It may mean — a new force which would have come into operation just the same and which would have produced the same final damage at just the same time, even though the defendant's earlier tortious conduct had never taken place. If the premise is construed in this way, the conclusion is not likely to be disputed. But the phrase may mean — a new force, sufficient when, and only when, added to, or operating in connection with, the effect already existing as a result of defendant's tort. If this is the correct interpretation, then we submit that the proposition is not universally true. There are cases where the earlier tortious act may have such continuous efficacy (may continue to be so potentially operative) that it must be regarded as a substantial factor in subjecting plaintiff to the damage. "We have been cited to no authority in a suit for the recovery of damages, where it was shown that, if the 'result' was the necessary and inevitable effect of a first cause, and a new independent force intervened sufficient of itself to produce the effect, and only hastened the result, the first cause was held to be too remote. In such cases both causes necessarily contribute to the result." *Coleman, J., in Thompson v. L. & N. R. Co.*, 91 Ala. 496, 500, 8 So. 406, 408 (1890). Because the later or intervening tortfeasor can be held liable, it does not necessarily follow that the earlier tortfeasor is exonerated. The contrary view seems

to have been taken by Strong, J., in *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U. S. 469, 475 (1876), in the following passage:

"We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or non-feasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause." But this is in effect the same fallacy involved in the view of the trial judge in *Vicars v. Wilcocks*, 8 East 1 (1806), namely, that the fact that the plaintiff has a remedy against the "later" wrongdoer constitutes *per se* a sufficient reason for denying him a remedy against the "earlier" wrongdoer. Mr. Bower's answer to that view has already been quoted in an earlier part of this article:

"Where it is a question whether A. has been injured by B., it is wholly immaterial whether he has or has not an additional or alternative remedy against C., and it can never lie in the mouth of a wrongdoer, if he is a wrongdoer, to set this up." Bower, *Code of the Law of Actionable Defamation*, 315. Compare *Watson, Damages for Personal Injuries*, § 74.

Of course, it is not contended that the earlier of two "successive" wrongdoers would *always* be liable. On the contrary, in a large proportion of cases it would be found as matter of fact, and rightly found, that the earlier tort was not potentially operative at the time of committing the later tort (or, at all events, not so at the time of the damage) and that the later wrongdoer was the sole substantial human factor in bringing about the damaging result.

"There is no doubt that a man sometimes may be liable in tort, notwithstanding the fact that the damage was attributable in part to the concurrent or subsequent intervening misconduct of a third person. . . . But the general tendency has been to look no further back than the last wrongdoer, especially when he has complete and intelligent control of the consequences of the earlier wrongful act." Holmes, J., in *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 48, 49, 15 N. E. 84, 86, 87 (1888).

Moreover, if the only fault sought to be imputed to the earlier conduct was that of negligence, it might be held that there was no negligence if it was improbable that the earlier conduct would tend to induce the commission of a subsequent tort.

Even if the foregoing general views are deemed sound, it may still be contended that the *wilful* tort of a later wrongdoer, if not foreseeable as probable, will always and necessarily break causal connection, and thus prevent holding the earlier wrongdoer as a part of the cause of the damage. It cannot be denied that such an idea has been entertained. See Holmes, L. J., in *Sullivan v. Creed*, [1904] 2 I. R. 317, 356. But we are inclined to question its universal applicability to all conceivable situations. There are wide diversities of fact as to the nature of the tort of the earlier wrongdoer, and as to the extent of its continuing efficacy. Those diversities (as to continuing efficacy) are differences of degree, not reducible to rule. All that we contend for is, that the conduct of the earlier tortfeasor may, in some cases, be of such a nature and have such a continuing effect that a jury can find it to be a substantial factor in subjecting the plaintiff to the damage, *i. e.* find it to be a part of the cause, and not merely an antecedent fact whose effect ceased when the later wrongdoer began to commit a wilful tort. In *Fottler v. Mosely*, 185 Mass. 563, 70 N. E. 1040 (1904), the defendant, the earlier of two "independent" *wilful* tortfeasors, was held liable in an action of deceit, although he did not foresee the commission of the later tort; and although the earlier tort had no tendency to induce the commission of the later tort, but merely exposed the plaintiff to a risk of loss in case the second tort should be committed.

A PROBLEM IN THE DRAFTING OF WORKMEN'S COMPENSATION ACTS.

I.

PERSONAL INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT.

UNTIL very recently it has been assumed that the right of action which workmen had at common law against their employers secured to them a reasonably adequate remedy for the loss which they sustained by injuries due to industrial accidents. Whatever legislation there was looking to a fuller remedy preserved the fundamental conception of the common law that fault in the preparation or operation of the business was essential to the employer's liability. Such legislation merely relieved employees, more or less fully, from the operation of certain defenses, some of them peculiar to the relation of master and servant, as that of fellow service, others common to all persons who had associated themselves with others for the mutual benefit of both, as that of voluntary assumption of risk. In some few instances they are relieved from the defense of contributory negligence, available against all who seek compensation for harm resulting from another's negligence.

Within the last few years, particularly within the last two, there has been a complete change in the attitude of public opinion. There are now in force in no fewer than ten states acts by which the owner of a business is made to bear a part of the loss resulting to his workmen from injuries received by them in his service, whether due to a defect in the conditions or operations of the business or not, or to insure his workmen at least partially against such loss. Nor has this movement spent its force; on the contrary, the impulse towards such legislation seems stronger than ever. It is not proposed to discuss the economic or social problems involved or to consider all the legal questions presented; no attempt will be made to deal with the very difficult questions which arise as to the constitutionality of such acts, whether compulsory or — in form at least — elective. One question, and one only, will be discussed.

Whether the system adopted is that of insurance as in Germany and generally on the Continent of Europe, or compensation payable directly by the employer as in England, every act so far enacted or drafted has, in defining the injuries to be insured against or compensated, adopted phraseology copied verbatim or modeled closely upon the language used in the English Acts of 1897 and 1906, in which it is provided that,

"if in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall . . . be liable to pay compensation."

This language has been adopted upon the assumption that it has acquired by judicial construction, during the years which have elapsed since these acts were passed, so fixed and certain a meaning that a resort to the English decisions will, in a great majority of cases, render further interpretation and construction unnecessary and so avoid that vast amount of litigation generally required for this purpose.

It is the purpose of this article to examine briefly the English, Scottish, and Irish cases in which this section has been considered and to ascertain whether this assumption is in fact justified, and whether in so far as a definite meaning has been judicially attached to these words, it is one which carries into effect the objects which such legislation is designed to accomplish. It is necessary also to ascertain whether such definiteness as exists has been reached by a course of reasoning such as is apt to commend itself to American courts, or whether it has not resulted from arbitrary and illogical distinctions.

In ascertaining whether the construction put upon this clause accomplishes the objects which such legislation is designed to carry into effect, it is impossible not to consider briefly the public opinion which demands such legislation. While a large part of the thinking public is dissatisfied with the present method of distributing the loss caused by industrial accident and desires to transfer to the employer at least a part of it, it is extraordinary how little unanimity there is as to the reasons for their dissatisfaction with the existing state of the law and for their desire to alter it. The motive which dominates probably the largest body of persons who advocate workmen's compensation acts is sentimental humanitarianism, that altogether admirable instinct which revolts from the contemplation of individual suffering and which regards as unjust any condi-

tion, social or legal, which throws a loss upon a class of individuals unable to bear it without actual suffering. There is a further body of public opinion, that of the advanced collectivist who believes that society as a whole should share the shock of industrial accidents rather than that it should be borne by the particular individual whose ill fortune it is to suffer it immediately, and so desires to place the burden primarily upon the employer, who, in theory at least, can add the cost to the price of his product and so distribute the loss among that part of the community at least whose wants call his business into existence. This sentiment is stated by a considerable group of economists in the form of the economic law or doctrine, to the effect that the consumer should bear, as part of the cost of the article which he uses, all the loss which its manufacture entails, including the destruction and impairment of the human instrument of manufacture as well as the destruction and impairment of the other instruments, which, since such instruments are owned by the employer, is already taken into account in fixing the price of the commodity. There is a large body of public opinion that believes that the task of maintaining those reduced to want by industrial accident should be borne primarily by the industry which creates it, and ultimately by the consumer to whose wants such industries minister, rather than that it should be thrown directly upon the public funds realized by taxation.¹ Another considerable body of public opinion is inspired by that different species of humanitarianism which considers the improvement of the human race as a primary object of consideration rather than the relief of unfortunate individuals. To such a one it appears intolerable that workmen and their families as a class should be subject to the risk of fortuitous degradation in the social scale by an accidental injury to the head of the family, thereby throwing the entire family back into a submerged or pauper class or into a class but little better, and so rendering nugatory the effort expended in raising them to the position from which their mere misfortune has cast them. To workmen as a class such legislation may well appear a distinct gain, and their support has undoubtedly been a strong impulse to the adoption of this sort of legislation.

But there is in addition a large class who entertain a well-grounded

¹ See Fletcher Moulton, L. J., in the recent case of *Astley v. Evans & Co.*, [1911] 1 K. B. 1036, 1042-1043.

and growing dissatisfaction with the waste and uncertainty of the present state of the law,—a waste which is inseparable from any system which requires the proof of fault as a basis to liability and which, being based upon the essentially common-law idea of antagonistic litigation, makes the right to recovery depend upon the proof of difficult and uncertain issues of fact. If the acts passed and those which undoubtedly will be passed accomplish no more than the extension of the field within which claims of workmen for compensation may be advanced with a chance of success, but within which the employer may hope equally to resist liability successfully, the waste of litigation instead of being diminished will be increased by widening the area in which it may occur. Such a result would satisfy no one.

The relief afforded workmen and their dependents will still fall far short of that intended. Even if the workmen or his dependents are successful, a part of the sum paid by the employer will be diverted to the payment of legal expenses and counsel fees, which, unless strictly scrutinized and rigorously supervised, will undoubtedly tend to be exorbitant. It is impossible to suppose that the awakened public conscience will be satisfied to have any considerable proportion of the relief which such acts are designed to give to workmen and their dependents go to that highly unpopular species of the genus middleman, the accident lawyer, or as he is sometimes, perhaps not unjustly, called, the ambulance-chaser. Not only will the relief be diminished in amount but it will be delayed during the period of litigation. The inability of the working classes to bear without undue suffering and social degradation the loss resulting to them from industrial accident alone justifies their being singled out from among all those accidentally injured by business activities as worthy of this special relief. The object is to provide for the workmen and his dependents a means of livelihood in lieu of the wages which his injuries prevent him from earning. In no act, enacted or proposed, is the "waiting period" during which the workman himself bears the loss of his earning power greater than two weeks, and this because the various commissions that have drafted the acts have concluded that workmen as a class are incapable of adequately caring for any longer period of enforced idleness. If this be true, it is evident that the hope of future compensation, after months or perhaps years of litigation, would not adequately save them from suffering, preserve them from economic and social de-

gradation, or prevent them becoming a charge on public or private charity. In order to relieve their immediate needs, they would be forced to consent to disadvantageous compromises or to sell their claim at a ruinous discount. Nor can unscrupulous employers or their insurers, who, having no direct contact with labor, would have less inducement to treat claimants fairly, be expected to neglect the opportunity of forcing such compromises by defending every case in which there was the most remote chance of success.

To employers the result is at least as unfavorable. They would be subjected to new demands and added costs, not merely in the sums expended for compensation, but in those paid for the cost of litigation as well, without any corresponding saving. There is a point beyond which the cost of production cannot be increased without destroying the profit of the producer and so directly driving him out of business or raising the cost of the commodity to a point where the demand is stifled, and so indirectly reaching the same result. The ultimate success or failure of this form of legislation, one may venture to predict, will depend upon whether the modern humanitarian and collectivist sense of justice can be satisfied without unduly burdening business or the consumers whom it serves, and this can only be done by recouping the employer for the additional burden which will undoubtedly be put upon him by relieving him from the cost of litigation, by reducing to a minimum the cost of enforcing the claims, and so securing to workmen and their dependents the fullest possible share of the sums paid by the employers, and by making the compensation payable to them at the earliest possible moment, so that their current expenses can be immediately met. To accomplish this it is essential that the act should be so drawn as to be as far as possible automatically applicable to any given state of fact, and, as far as may be, to prevent the right to compensation from becoming a subject of antagonistic litigation.

There is also a substantial agreement that the duty of making compensation is not to be imposed upon the business as a penalty for its misconduct. The determination of the existence or extent of liability, or of the right to compensation, by the guilt or innocence of the parties, is appropriate only if the object of the act is to punish wrongdoing. Punishment is both expiatory, a penalty for the fault committed; and preventive, a deterrent to the commission of a fault penalized. The objects of such acts being, not to punish the

owners of delinquent businesses but to remedy the existing condition of affairs which offends modern ideas of social justice and to protect workmen and their dependents, as a class incapable of self-protection, from want and social and economic degradation, fault as a thing to be expiated has no place therein as a determining factor. There are many persons who believe that a compensation act should concern itself only with the adjustment of a loss actually sustained and that the prevention of accident should be dealt with by separate and distinct legislation. But no act, however carefully drawn with this object in view, can fail to have a distinct preventive force in that it becomes to the master's advantage to diminish accidents with the attendant liability to make compensation for the resulting loss, and so the spur of self-interest operates to impel the employer to take steps for the protection of his employees. And since it seems that the ultimate object is to protect workmen and their dependents from want and degradation, social and economic, the loss caused by industrial accidents actually occurring being placed upon the employer merely as a means to this end, the remedy would be needlessly incomplete if any effective incentive to the elimination of the cause of the loss were overlooked.

Therefore a penalty should be imposed upon fault productive of industrial accidents if, but only if, there is good reason to believe that thereby the commission of such faults will in whole or in part be prevented and so the number of such accidents diminished. It would seem, therefore, that, where the employer has personally been guilty of a deliberate failure to provide adequately for the safety of his work-people, he should be liable to make an enhanced compensation, or the employee's right to sue for all his loss at common law should be preserved. But it does not follow that the workmen should also be deprived of compensation because their injury is due in part or in whole to their deliberate, wilful, and serious misconduct. It may be that the public sense of justice has not yet reached the point where it can divorce itself from the idea that a man wilfully reckless and deliberately taking serious and unnecessary risks should suffer for his conduct, but unless there is so strong a feeling to this effect that an act not recognizing it would be generally regarded as unjust, there seems no justification for depriving an employee of compensation because of even wilful and deliberate misconduct, unless there is good reason to believe that by so doing

servants as a class will be impelled to avoid such acts, and that thus the great number of accidents to themselves and others due thereto will to some considerable extent be prevented.

It may perhaps seem unjust to make the master and not the servant suffer for his individual fault. But it must be remembered that the employer suffers alone, and that, while the fault is that of the injured workman, the penalty is paid not by him only, but by those dependent upon him as well. The public opinion which regards it as unjust that a man should profit by his own fault may yet shrink from visiting the sins of the father upon the children. Then, too, an enhanced compensation will not, save in very exceptional cases, seriously cripple a business, while to deprive a workman and his family of compensation will be their economic destruction. The English Act of 1897 provided that no compensation should be allowed if the injury to the workman was attributable to wilful and serious misconduct, and under the German law the workman is still barred by his own gross carelessness. But in the English Act of 1906 compensation was allowed where the accident results in death or serious and permanent disablement. It may be that it was thought that the risk of such serious consequences would be sufficient deterrent to the workman, but it is significant that in the one case the whole of the loss would fall upon innocent dependents, and that in the other the consequence to the workman and his family would be the total destruction of their means of livelihood.

But apart from this there is good reason to believe that, while the penalty of an additional liability imposed upon employers for the deliberate disregard for the safety of their employees may be expected to impel them to afford their employees such protection as will materially diminish the number of accidents, denial to a servant and his dependents of compensation for his wilful and reckless misconduct cannot reasonably be expected to have such an effect. The employer runs no risk of personal injury — his interest in his employees' safety is either directly or indirectly financial or humanitarian. Very many employers, impelled by humane motives, or realizing that by securing the safety and good will of their employees they will increase their efficiency, do expend large sums in providing every reasonable protection to their work-people, but such motives alone are insufficient to cause those employers who regard the matter as purely one of dollars and cents to take such

precautions, so long as they are subject to no additional liability for their failure to do so. The only consideration which can move such employers is the knowledge that the sums expended in protection will save them from the necessity of paying greater sums under an increased liability. The interest of the servant, on the contrary, is not wholly financial; the servant by his reckless conduct risks his own person as well as his earning power. But since the fear of personal injury and of the loss of their earning power, which under our present system they must bear themselves, has not in the past proved sufficient to deter workmen from recklessly running unnecessary risks, it is hardly probable that they will be impelled to greater care through the fear of forfeiting the compensation to which they would be entitled under the act if injured without recklessness.²

There is an additional reason why a workman should not be barred by his reckless exposure of himself to unnecessary danger. Whether the exposure is deliberate, whether it is reckless, whether a danger is unnecessarily encountered, are all highly controvertible and litigable questions. While the American workman probably takes greater risks than any other, he is accustomed to working more quickly. This rapidity of work carries with it as an inseparable incident the necessity of taking chances. Not only is he accustomed to work rapidly, but rapidity is required of him. How far then his exposure is wilful and deliberate in the sense that it is done for a purely private purpose of his own, how far the danger is unnecessary and not merely one which he must face in order to reach the standard of efficiency required by his master, will in many cases be doubtful.³

Since the denial to workmen of compensation for injuries caused

² This is not a trait peculiar to work-people but is common to all humanity. While men seek to avoid dangers for fear of injury, few, if any, refrain from any action simply because such action will bar a possible right of suit for damages.

³ Take the instance of a failure to use safety devices provided by the master or to obey the rules and regulations made for the workmen's protection. The contention of the workmen in many cases is, that the safety devices impede rapid work, and that they are required to produce an output or to work at a rate which makes it impossible to use such devices or to obey the rules and regulations and yet reach the standard of speed and efficiency in production which their employers require of them, and that if they do fall short of this standard, the excuse that the failure is due to their use of safety devices or their obedience to rules and regulations will not protect them from at least the bad opinion of their employers.

by their deliberate disregard of their own safety and that of their fellow workers does not seem likely seriously to check such conduct, while it would undoubtedly tend to raise highly doubtful and litigable questions of fact, it seems advisable to deny compensation only when the sufferer has intentionally brought the injury upon himself, as has been done in many of the recent acts, enacted and proposed. If such course be pursued, it is quite evident that the act should be so clearly drawn that it will be impossible for the courts, who may well be out of sympathy with the idea of allowing compensation to one wilfully at fault or those who are dependent upon him, indirectly to defeat the purpose of the act by construing vague and uncertain definitions of the injury to be compensated as excluding injuries from risks to which the claimant's deliberate misconduct has exposed him. If, on the contrary, it is thought advisable to make deliberate misconduct, obviously tending to subject the workman to grave and unnecessary risk, a bar to compensation, this should be explicitly set forth in some separate clause of the act as a special exception to a general liability,⁴ as was done in the English Act of 1897; and here again the injuries which are the subject of this general liability should be so clearly defined that the guilt or innocence of either party cannot possibly be held to be a determining factor.

The consideration of the English cases which have defined and applied the provision, contained in both of the English Workmen's Compensation Acts, that

"if in any employment a personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall . . . be liable to pay compensation,"

may be conveniently divided into two principal inquiries: *First*, how has "personal injury by accident" been defined? *Second*, what, if any, definite principles and rules had been formu-

⁴ It would seem well to specify clearly the particular forms of misconduct, as intoxication, failure to use safety appliances, etc., which are to bar compensation. Thus the very difficult and doubtful question as to whether any particular misconduct is so serious and wilful as to bar the claimant will be in great part eliminated. And also it will be impossible for courts to give so wide a construction to the term "serious" as practically to reintroduce the defenses of contributory negligence and voluntary assumption of risk, or a defense which is a composite of the two, and as such may be called the voluntary and negligent assumption of unnecessary risk.

lated for the determination of the question whether such an injury "arises out of" and is received "in the course of the workmen's employment"?

"Personal Injury by Accident."

1. Since the decision in *Brinton's Ltd. v. Turvey* there seems to be no doubt that disease contracted in the course of the employment is as much an injury as a violent alteration of the physical structure of the body. It is true that there occur *dicta* which indicate that it is not every disease caught by the workman in the course of his employment that is to be regarded as "an injury by accident."⁵ But it would appear that what these refer to is the necessity that the disease shall be sustained by accident arising out of and in the course of the employment. This requirement applies equally to the impairment of the physical structure, and notwithstanding these *dicta* it may be taken that the later English cases draw no distinction between these two forms of injury.

In the case of *Brinton's Ltd. v. Turvey* the deceased was employed in opening and sorting bales of wool, and while so employed the bacillus of anthrax settled in the corner of his eye and caused infection; it was held that his death was an "injury by accident" for which his dependents were entitled to compensation. Much stress is laid, in the opinions in the Court of Appeal, upon the fact that the impact of the germ was a violation of the integrity of the claimant's body, — a blow which, though microscopically minute, produced an immediate effect upon the claimant's person. In the House of Lords particular emphasis is laid upon the accidental nature of the infection, the great number of unusual factors which contributed to it. This decision, therefore, did not involve the necessity of holding any disease, other than that caused by specific

⁵ [1905] A. C. 230, 7 W. C. C. (Workmen's Compensation Cases) 1.

⁶ So, Lord Atkinson in his dissenting opinion in *Clover, Clayton & Co. v. Hughes*, [1910] A. C. 242, 250, 3 B. W. C. C. (Butterworth's Workmen's Compensation Cases) 775, says: "the definition given of 'by accident' in *Fenton v. Thorley*, [1903] A. C. 443, must exclude disease." See also the language used by Lord Macnaghten in his dissenting opinion in *Ismay, Imrie & Co. v. Williamson*, [1908] A. C. 437, 1 B. W. C. C. 232, the very guarded language of Lord Ashbourn in the same case, the opinions of *Cozens-Hardy*, *M. R.*, *Farwell*, *L. J.*, in *Eke v. Hart-Dyke*, [1910] 2 K. B. 677, 3 B. W. C. C. 482, and the Lord President in *Coe v. The Fife Coal Co.*, 46 Scot. L. Rep. 328, 2 B. W. C. C. 8 (Ct. Sess., 1909).

germ infection, or that contracted under conditions unusual in the business, to be an injury by accident. However, the later cases, following it, have discarded such refinements and have held that any disease of sudden origin, if plainly attributable to the nature of the workman's employment, is an injury by accident. So, it has been held, that a heat-stroke sustained by a stoker in the stokehole of a steamer,⁷ a sun-stroke received by a sailor engaged in painting a vessel in dry-dock,⁸ and kidney disease due to a chill contracted while working waist deep in water,⁹ were injuries by accident. It is to be noticed that these cases go beyond the reasoning of the above opinions in *Brinton's Ltd. v. Turvey*. No foreign substance, however minute, had struck or invaded and injured the person's body. In none of them was there anything unusual in the work in which the workman was engaged; there was no series of unexpected events which brought about his disease; the only thing unexpected in any of these cases was that such work should injure the man engaged upon it, the only unknown and unusual factor was the physical condition of the workman, which rendered him subject to the disease contracted.

2. But it is not enough that the servant is injured while employed, whether the injury be by disease contracted or by some disturbance of his physical structure. In either case the injury must be "by accident." The term "by accident" has been consistently construed to include two different ideas: the first is that of unexpectedness; the second, that of an injury sustained on some definite occasion, the date of which can be fixed with reasonable certainty. The first idea would be as well conveyed by the word "accidentally" or by any phrase or phrases in which unforeseen harm is sharply contrasted with harm intended or expected to result. The latter idea, it is submitted, is not necessarily included in the term "accidental" or "accidentally"; such words, especially if the phrases employed in such legislation are to be construed in accordance with the popular meaning of the terms used, do not appear necessarily to indicate the existence of an accident, but would seem to relate solely to the injury being neither intended nor expected.

⁷ *Ismay, Imrie & Co. v. Williamson*, [1908] A. C. 437, 1 B. W. C. C. 232.

⁸ *Morgan v. S. S. Zenaida*, 25 T. L. R. 446, 2 B. W. C. C. 193 (C. A., 1909).

⁹ *Sheeran v. Clayton & Co.*, 3 B. W. C. C. 583 (1909). So in *Kelly v. Auchenlea Coal Co.*, 48 Scot. L. Rep. 768 (Ct. Sess., 1911), it was held that pneumonia caused by inhalation of poisonous gas was an injury by accident.

While the English cases have consistently regarded the phrase "by accident" as indicating something unexpected, the earlier and later cases differ as to whether the cause of the injury must be some unforeseen and unusual operation of the business or condition of the plant, or whether it was enough that the injury itself was unexpected.

The earlier cases required that there must have been something unusual and unexpected in the external influences to which the sufferer was subjected in the course of his employment. No injury was regarded as sustained by accident where the workman was harmed while doing the very work he was employed to do under conditions usual thereto. No compensation was awarded unless there was some departure from the ordinary operation of the business or some unusual condition of the plant; it was not enough that, because of some peculiar physical condition of the workman, permanent or transitory, known to him or not known to him, the work, which he did not expect to injure him, in fact proved harmful; there must be some factor external to the claimant's physical condition.

The courts, however, were prone to regard rather minute departures from the ordinary course of the employment as being sufficient to amount to an unexpected external event.¹⁰

It was also held that the departure from the usual operation of the business might be some unusual act of the servant himself if done in the prosecution of the business, and this act might be some careless act of his own, — an unintentional slip, or an act intentionally done but whose results, owing to some miscalculation, were not foreseen or designed.¹¹ It is evident that there is much

¹⁰ So it was held that a strain received while lifting a pile of boards which had been stuck together by ice and whose removal thereby required an unusual effort was an accident. *Timmins v. Leeds Forge Co.*, 83 L. T. 120, 16 T. L. R. 521, 2 W. C. C. 10 (1900). And so it was held that the claimant might recover compensation where his hand was jarred by a blow inaccurately struck by a fellow workman on the tool which the claimant was holding. *Lloyd v. Sugg & Co.*, [1900] 1 Q. B. 481, 486, 2 W. C. C. 5.

¹¹ In *Boardman v. Scott & Whitworth*, [1902] 1 K. B. 43, 4 W. C. C. 1, a workman was required to remove a beam from a loom and in lifting it he balanced it unevenly upon his shoulder. In order to get it into a position of equilibrium, he gave it an extra lift, the strain of which lacerated the muscles in his side; it was held that this was an injury by accident, the improper and unusual manner in which the workman himself had originally balanced the beam upon his shoulder being taken to be an unusual condition of the labor which the servant had not expected to encounter.

to be said for this interpretation; any other view would bar a stupid or ignorant servant from compensation where he had through some slight miscalculation subjected himself to injury which a more skilled and prudent workman would have avoided.

Since the case of *Fenton v. Thorley*, nothing more is required than that the harm that the plaintiff has sustained shall be unexpected.¹² It is no longer required that the causes external to the plaintiff himself, which contribute to bring about his injury, shall be in any way unusual; it is enough that the causes, themselves known and usual, should produce a result which on a particular occasion is neither designed nor expected. The test as to whether an injury is unexpected and so if received on a single occasion occurs "by accident" is that the sufferer did not intend or expect that injury would on that particular occasion result from what he was doing. What was actually probable or even inevitable because of circumstances unknown to the sufferer is even more unimportant.¹³ The test is purely subjective to the injured workman.¹⁴

¹² "In determining the question whether the injury was caused by an accident we must discriminate between that which must occur and that which need not necessarily occur in the course of the employment," Mathew, L. J., in *Boardman v. Scott & Whitworth*, *supra*; though it be a thing which has happened before and is likely to happen again. *Neville v. Kelly Bros., etc.*, 13 Brit. Col. 125 (1907). In one class of case there is a tendency to regard as accidental injuries which the workman probably foresaw as very likely to result from some particular action intentionally undertaken. There are cases where a workman voluntarily encounters a very serious risk of injury in an effort to save his master's property from injury or to rescue a fellow workman from peril, and so, if successful, incidentally protecting his employer from liability to make compensation or diminishing the amount thereof. *Rees v. Thomas*, [1899] 1 Q. B. 1015, 1 W. C. C. 9 (workman injured while trying to stop his employer's runaway horses); *Hapelman v. Poole*, 25 T. L. R. 155, 2 B. W. C. C. 48 (1908) (menagerie attendant killed while trying to drive escaped lions back to their cage); *Matthews v. Bedworth*, 1 W. C. C. 124 (County Ct., 1899) (miner killed in going down shaft, after being warned of danger, in order to rescue fellow miner overcome by choke damp); *London & Edinburgh Shipping B. v. Brown*, [1904-1905] Session Cases 488, 7 Fraser 488 (Ct. Sess., 1905) (dock laborer killed in an attempt to rescue fellow worker overcome by noxious gas in the hold of a vessel which he was unloading). But see the strong dissent of Lord Kyllachy in the last given case. In none of these cases was the injury inevitable, though in most of them the danger was very great.

¹³ It is quite clear that the view advanced by Lord Shaw in *Clover, Clayton & Co. v. Hughes*, [1910] A. C. 242, 3 B. W. C. C. 775, that nothing is unexpected which is inevitable under conditions actually existing though unknown to everyone, is untenable; such a purely objective view of unexpectedness would clearly bar compensation in all but that small class of case where the injury results from some unusual combinations of causes.

¹⁴ In the late case of *Clover, Clayton & Co. v. Hughes*, *supra*, Lord Macnaghten,

By this definition the intention or expectation of anyone other than the injured workman is immaterial. An injury, unexpected by him, is none the less an accident because intentionally inflicted by some third person.¹⁵ The workman's miscalculation as to the consequences of an intentional act, under circumstances perfectly well known to him, makes the result, actually inevitable and patently so to all the by-standers, an unexpected result and so an injury by accident.

The battle ground upon which the advocates of these different conceptions of unexpectedness have contended is that class of case which deals with the right of a person who, having some known or unknown physical weakness, is injured by doing the ordinary work which he is engaged to do, — work which would not have been injurious to any man in normal health. Under the decision of *Clover, Clayton & Co. v. Hughes* there is an injury by accident arising out of the employment when the exertion required in doing the work is too great for the man undertaking it, whatever the degree of exertion or condition of health.¹⁶ It is immaterial whether the servant knows of his weakened physical condition, unless he is thereby led to expect injury to result to him as the result of a particular piece of work on which he is engaged. It is also immaterial

whose definition of the words "by accident" in *Fenton v. Thorley* is constantly cited as authoritative, says: "An occurrence I think is unexpected if it is not expected by the man who suffers by it, even though every man of common sense who knew the circumstances would think it certain to happen."

¹⁵ So it was held in *Nesbit v. Bayne & Burn*, [1910] 2 K. B. 689, 3 B. W. C. C. 507, that the death of a cashier murdered while travelling by rail with a large sum of money to pay wages to his employer's miners, and in *Anderson v. Balfour*, [1910] 2 I. R. 497, 3 B. W. C. C. 588, a beating administered by poachers to a gamekeeper, were injuries by accident. But see *contra*, *Murray v. Denholm & Co.*, 48 Scot. L. Rep. 896 (1911), where it was held that injuries inflicted upon non-union workmen by a mob of strikers who had invaded the employer's premises in order to drive out "blackleg" labor was not an injury by accident. The case of *Challis v. London, etc. Ry.*, [1905] 2 K. B. 154, 7 W. C. C. 23, does not present this precise point, since the injury to the plaintiff, an engine-driver, was caused by stones thrown from a bridge by boys whose object was to throw them down the smokestack and not to hit the driver. The difficulty in the cases when an employee is intentionally injured by third persons having no connection with his employer's business is to determine whether it arises out of the business.

¹⁶ Lord Loreburn in *Clover, Clayton & Co. v. Hughes*, [1910] A. C. 242, 3 B. W. C. C. 775. So compensation was allowed in *Dotzauer v. Strand Palace Hotel*, 3 B. W. C. C. 387 (C. A., 1910), where the plaintiff's physical condition was such that the ordinary conditions of the work, innocuous to ordinary persons, had injured him. The plaintiff, a dish washer with a peculiarly sensitive skin, was seriously affected by an ordinary washing mixture.

that a person, having medical skill or even the experience of an ordinary individual, would, if he knew what the workman knows, realize that injury must result from the work done; the injury is still unexpected if the workman miscalculates his powers and so overtaxes his strength and injures himself, so long as the sufferer does not intend to injure himself thereby or expect that injury will result to him on the particular occasion.¹⁷

3. The injury, to be regarded as "by accident," must be received, or, if a disease, contracted, at a particular time and in a particular place and by a particular accident.¹⁸ And the accident must be something the date of which can be fixed.¹⁹ It is not enough that the injury shall make its appearance suddenly at a particular time and upon a particular occasion.²⁰

The injury must result from some particular incident in the business, some act done, or condition encountered, which has in the course of the sufferer's employment caused the particular harm, whether disease or physical impairment, of which the plaintiff complains. This incident, whether an act done by him or by some

¹⁷ It is perhaps difficult, if not impossible, to reconcile the later case of *O'Hara v. Hayes*, 44 Ir. L. T. R. 71, 3 B. W. C. C. 586 (1910), with the decision in *Clover, Clayton & Co. v. Hughes*. In the latter case the plaintiff, who was suffering from aneurism of the aorta, was called upon to tighten up a nut with a spanner. The very slight exertion which was required caused the aneurism to break, resulting in his instant death; it was held that this was an injury by accident. In the case of *O'Hara v. Hayes*, a man affected with heart disease dropped dead while hurrying to the railway with a parcel weighing seventeen pounds. The county court judge held that in view of his disease there was evidence tending to show that the exertion involved in carrying this heavy parcel caused his collapse and death, but held that this was not an injury by accident. Two questions were submitted to the Court of Appeal: First, whether there was evidence to support this finding of fact; second, if such was the case, was the death an injury by accident? The Court of Appeal did not consider the first of these questions, but held that he was doing his normal work, there was nothing sudden, his death was not unexpected, he was liable to die any moment, and that the county court judge was right in holding that his death was not an injury by accident.

¹⁸ *Cozens-Hardy, M. R.*, in *Eke v. Hart-Dyke*, [1910] 2 K. B. 677, 3 B. W. C. C. 482, 487.

¹⁹ *Collins, M. R.*, in *Steel v. Cammell, Laird & Co.*, [1905] 2 K. B. 232, 7 W. C. C. 9, 11: "In my opinion it is clear from s. 2 (2) of the Act, that an accident must be something the date of which can be fixed." The section in question provides that: "proceedings for recovery under this Act, for compensation for an injury, shall not be maintained unless notice of the accident has been given as soon as practicable after the happening."

²⁰ *Steel v. Cammell, Laird & Co.*, *supra*. A workman who had worked for some time exposed to lead infection, became suddenly poisoned; this was not held to be an injury by accident.

other person or the encountering of some condition, must be shown to have occurred at some reasonably definite time. It is true that under *Fenton v. Thorley and Clover*, *Clayton & Co. v. Hughes* the incident, the act done or the condition encountered, need not be unusual except in this, that on the particular occasion its result is unexpected. The element of unexpectedness, inherent in the word "accident," is sufficiently supplied either if the incident itself is unusual, the act or conditions encountered abnormal, or if, though the act is usual and the conditions normal, it causes a harm unforeseen by him who suffers it. By this construction injury of gradual growth, as such not the result of some particular piece of work done or condition encountered on a definite occasion, but caused by the cumulative effect of many acts done or many exposures to conditions prevalent in the work, no one of which can be identified as the cause of the harm, is definitely excluded from compensation. And this is so whether the injury complained of is a disease contracted or an impairment of the physical structure of the body.²¹ So stringent is the requirement that the injury should be due to some particular incident in the employment, that it has been held not enough that the complainant can point out a very few occurrences from some one or more of which the harm must have resulted.²²

²¹ It has been held that the following diseases are not injuries by accident: Lead poisoning due to the continuous exposure to infection, though taking the form of a sudden paralytic seizure, *Steel v. Cammell, Laird & Co.*, *supra*; enteritis contracted by constantly inhaling sewer gas, in contact of which the complainant's employment habitually brought him, *Broderick v. London County Council*, [1908] 2 K. B. 807, 1 B. W. C. C. 2819; "beat hand," "beat knee," miner's diseases caused by continued friction, *Marshall v. East Holywell Coal Company*, *Gorley v. Backworth Collieries*, 21 T. L. R. 494, 7 W. C. C. 19 (C. A., 1905); with which compare *Thompson v. Ashington Coal Co.*, 17 T. L. R. 345, 5 W. C. C. 71 (1901), in which it was held that the claim that is due to a particular piece of coal working itself into the knee of a miner who frequently had to work upon his knees was an injury by accident. The following impairments of the physical structure of the body have been held not to be injuries by accident: Paralysis caused by continuous overstrain due to the complainant being forced to ride a carrier tricycle in the course of his employment, *Walker v. Hockney Bros.*, 2 B. W. C. C. 20 (C. A., 1909); and a gradual breakdown of the heart due to continued strain of overwork, *Coe v. The Fife Coal Co.*, 46 Scot. L. Rep. 328, 2 B. W. C. C. 8 (Ct. Sess., 1909). How narrow is the line of demarcation is shown by comparison of this case with *McInnes v. Dunsmuir & Jackson*, 45 Scot. L. Rep. 804, 1 B. W. C. C. 226 (Ct. Sess., 1908), where it was held that cerebral hemorrhage was an injury by accident, where an artery in the brain, weakened by long-continued overwork, suddenly burst as the result of a particular act of over-exertion done in the course of the sufferer's employment.

²² *Eke v. Hart-Dyke*, [1910] 2 K. B. 677, 3 B. W. C. C. 482. A gardener three sev-

Under these decisions two serious questions arise: *First*, whether the word "injury" should be retained without qualification; *second*, whether the words "by accident" should be omitted or retained, or whether some other word or phrase, such as "accidentally," should be used in lieu thereof.

1. In view of the English decisions holding that disease suddenly contracted in the course of employment is an injury by accident, it is evident that the word "injury" should not be used without qualification, unless it is desired that disease contracted should be a subject of compensation. The Act of 1897, under which the cases which have definitely attached this broad meaning to the word "injury" arose, made no provision for the relief of workmen incapacitated by illness or disease. Had the Act of 1897 contained the same provision for compensation for sufferers from occupational diseases which appears in the Act of 1906, it seems highly probable that compensation would be allowed only where injury is done to the integrity of the human body, as is the rule in Germany, where sickness, however caused, is cared for by a special fund raised by the joint contributions of the state, the employers, and the workmen, and administered by the latter.

The English courts, in their efforts to remedy the omission of Parliament to provide relief for workmen incapacitated by disease, have opened a wide door to claims of a highly litigious character. At first glance there appears little or no abstract justice in giving relief to one whose physical structure is violently deranged while at work, and denying it to one who is incapacitated by disease clearly proven to have been contracted in his employer's service. But there is a great practical difference between the two. Where there is a distinct change in the physical structure of the plaintiff, it is in the vast majority of cases possible and even easy to show some definite occurrence in the course of his service which has produced it, or at least the injury is generally one not likely to result from any other cause. The difficulty which will arise if compensation is allowed for disease lies in the fact that not only its existence but its

eral days opened certain drains and cesspools; it was held that even if his death was due to blood poisoning resulting from the emanations from the cesspools, it was not an injury by accident, since it was impossible to point out a particular occasion upon which he was poisoned; Kennedy, L. J., dissenting.

origin can as a rule be proved only by the statement of the sufferer himself, corroborated by the testimony of his physician, which usually goes no further than a statement that the disease might be caused by some incident of the employment. Such claims are not only particularly easy to fabricate, but there is a great tendency in a sufferer to ascribe, without conscious dishonesty, his illness to some cause from which he may hope to obtain relief. But even if they are honestly put forward, the success or failure of such claims must depend upon a highly doubtful issue of fact. If such claims be allowed there will be a natural tendency on the part of every workman who suffers from disease to ask the opinion of the court whether it arose out of the business, and even where it is fairly clear that the illness did so arise, the interest of the employer will naturally induce him to contest the claim in the hope that the opinion of the court may be in his favor.

Disease should be dealt with, if at all, by providing, as in Germany, for the relief of all servants incapacitated by illness no matter what its origin, preferably out of some fund provided by the joint contributions of the employers and the workmen themselves; and this fund should, it seems, be administered, as in Germany, by the workmen themselves, who will have a better opportunity to detect malingering and to prevent it by their disapproval of it, induced by their liability for part of the loss caused by it. This relief should probably be restricted, as in Germany, to illness of a moderate duration. Total incapacity caused by illness is cared for in Germany by the invalidity insurance, which forms a part of the old age insurance. As there is no corresponding fund out of which permanent disablement can be relieved, it would seem that provision may well be made for compensation for what are technically known as occupational diseases. It is true that in this way total incapacity from non-occupational diseases, clearly contracted in the employer's service, will go uncompensated; but on the whole the added certainty in the administration of the law seems more than to compensate for this, even admitting it to be unjust to a few deserving sufferers. Under the German system for relieving sufferers from temporary illness, the workman being entitled to relief if incapacitated by disease, whether contracted in the employment or at home, the only issue which can be raised is the existence of the disease and the extent of the incapacity caused thereby; that most difficult

issue, the origin of the disease, is completely eliminated. And while this issue must arise in any act giving compensation for occupational diseases, such diseases being those to which workmen in particular employments are by reason of the character of the work peculiarly subject and being of a sort not likely to be otherwise contracted, their very nature makes it reasonably certain that they are contracted in the employment and not elsewhere.

2. As has been seen, the term "by accident" differs from the term "accidental" in that it requires that the injury shall be sustained on a single particular occasion the date of which can be fixed, and so excludes any injury, whether the disturbance of the physical structure of the body, or disease, which is of gradual growth. Unless it is desired to allow compensation for diseases or bodily impairments of gradual growth, it is evident that the term "by accident" should be retained, and that it should not be omitted or the word "accidental" substituted.

While there may seem no particular justice in allowing compensation for an injury which happens on a definite occasion, and excluding compensation for one of gradual growth though just as much the result of the work upon which the sufferer is employed, there are practical considerations which make it desirable to do so. One of the most valuable provisions in the English acts (and one which is being copied in most of the American legislation upon the subject) is that contained in sub-section 2 of section 2, which requires that notice of the accident be given to the employer "as soon as practicable after the happening thereof." The master is thus able personally to investigate the matter soon after its occurrence and verify the justice of the claim or detect any fraud or imposition; and so it conduces to the settlement of well-founded claims without further litigation and leads to the discovery of malingering and simulation. If the date of the accident be known, it is usually possible to find impartial witnesses who have observed and can remember the occurrence. This is certainly so if the injury is due, as it usually is, to some abnormal incident in the operation of the business, to some unusual act of the claimant himself or his fellow workmen, or to some unusual condition of or breakdown in the machinery or plant. Even if there is nothing more than a sudden and unexpected injury the result of some normal and usual operation or condition of the business, this in itself is generally sufficiently

striking to make it probable that the circumstances will be observed and remembered by others than the claimant himself. Thus the employer is able by independent testimony to verify the workman's claim, and either settle it at once or to demonstrate so clearly its fraudulent character that the workman will abandon it. And even if the claim is neither settled nor abandoned, but must be litigated, there is apt to be reasonably impartial testimony upon which the court can proceed in awarding compensation.

If, on the other hand, compensation is allowed for injury not happening upon any definite occasion, it is evident that notice of the injury must be all that can be required, with perhaps an added requirement that the causes which are alleged to have brought it about shall be set forth. If compensation be allowed for injuries or diseases of gradual growth, it is manifestly impossible for the servant to assign any specific occurrence or occurrences as the cause of his disablement; at most he can merely state that he was engaged upon a work of a sort capable of producing injury of the sort of which he complains and that he attributes his disability thereto. Such claims are incapable of any verification by impartial testimony, their validity is a mere matter of opinion or judgment; the workman's story can be corroborated, if at all, only by the testimony of medical experts, that the work upon which he was engaged is capable of producing the injury in question. If a definite occasion be set out during which the assigned cause of the injury is alleged to have operated, it is at least possible to prove that on that occasion there was no other cause existing equally capable of producing the injury. If it is enough to ascribe the injury to causes operating generally during a protracted period, as that of employment at a particular sort of work, it will usually be impossible to say whether during that period the workman may not have been exposed to other causes, external to the business, which might as probably have produced the injury, unless the injury is one which, like certain occupational diseases, is plainly the result of a cause peculiar to the business and therefore extremely unlikely to be encountered elsewhere.

A wide door will be opened to fraudulent claims, and it must not be forgotten that the right to compensation for injuries of this sort will act as a strong incentive to workmen to attribute every disease, every wearing out of their physical powers, to their labors in their

employers' business, and this will be so though the workmen are not consciously fraudulent. The possibility of compensation will inevitably direct their minds to the business as the cause of their sufferings, and often quite unconsciously they will come honestly to believe that all their misfortunes are due to their work therein.²³

But there is a further serious objection to allowing compensation for injury or diseases of gradual growth. The effect of so doing would be to throw upon the last employer the duty of pensioning every workman worn out by a lifetime of labor or invalidated by long exposure to the unhealthy conditions necessarily incident to many employments. Unless some elaborate system, such as is found in the occupational disease section of the English Act of 1906, be provided for the apportionment of the compensation among all the various employers in whose service the workman has been engaged, the last employer will be forced to pay for the whole of a loss which his business has caused in part only. Not only will this work an injustice to the last employer, but the effect upon workmen themselves would be extremely unfavorable; it will become difficult for any man to obtain employment after he has passed the very height of his prime, and the point of superannuation will be very materially reduced.

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[*To be continued.*]

²³ See as to this the very interesting paper on "Some Defects in the Workmen's Compensation Act," by R. J. Collie, M.D., J. P., Transactions of the Medico-Legal Society, vol. 6, p. 70, especially pp. 90-98.

IS LAW THE EXPRESSION OF CLASS SELFISHNESS?

THIS question has received an affirmative answer, in the following unequivocal terms:

"The rules of the law are established by the self-interest of the dominant class, so far as it can impose its will upon those who are weaker."

There is no such thing as abstract legal principles or abstract justice, we are assured.

"The dominant class, whether it be priests or usurers or soldiers or bankers, will shape the law to favor themselves, and that code will most nearly approach the ideal of justice of each particular age which favors most perfectly the dominant class."¹

In support of these propositions, the author refers to numerous decisions of the courts. The New York Court of Appeals² declared the state prohibitory liquor law of 1855 unconstitutional, so far as it destroyed the property in intoxicating liquors, owned and possessed by persons within the state, when the act took effect. On the other hand, the Supreme Court of the United States³ upheld the constitutionality of the Kansas Prohibitory Liquor Law of 1881, which had been enacted to carry into effect the following provision of the Kansas Constitution, adopted by the people in 1880:

"The manufacture and sale of intoxicating liquors shall be forever prohibited in this State, except for medical, scientific and mechanical purposes."

The prevailing opinion in the former case, the author praises as "a model of lucid and logical reasoning." What has he to say of the *Mugler* decision and of other cases in accord with it? This:

"The liquor business being obnoxious and ill-defended, the courts abandoned it to its fate, and generally held that property in liquor may be confiscated."⁴

¹ Brooks Adams in *Centralization and the Law*, 20, 45, 64.

² *Wynehamer v. People*, 13 N. Y. 392 (1856).

³ *Mugler v. Kansas*, *Kansas v. Ziebold*, 123 U. S. 623, 8 Sup. Ct. 273 (1887).

⁴ Brooks Adams in *Centralization and the Law*, 110.

That the liquor business was obnoxious to the majority of the citizens of Kansas must be admitted, but that Mugler and Ziebold were ill-defended is most surprising, for they had the services of George W. Vest and Joseph H. Choate. In another connection,⁵ he declares: "The weak, like the brewer or the lottery seller, fare in proportion to their weakness." So far as the liquor business is concerned, statistics do not appear to bear out this charge. According to the census of 1850, the consumption of wines and liquors in the United States for that year was 94,712,853 gallons, while in 1880 it was 505,844,038 gallons. Certainly in the decisions referred to the liquor business did not fare in proportion to its weakness, for it was more than five times stronger in 1887 than in 1856.

In another set of decisions the author contrasts the rulings of the Supreme Court in certain elevator cases with those in certain railroad cases. His conclusion is that "these great roads represented a vast power and were protected accordingly," while the proprietors of the elevators "had not behind them an equal financial energy,"⁶ and therefore suffered the hard fate of the weak lottery seller and brewer.

This conclusion, it is submitted, is not in accordance with the facts. Justice Brewer, who dissented in the elevator cases, has declared,⁷ that neither in *Munn v. Illinois*,⁸ nor in *Budd v. New York*,⁹ nor in *Brass v. Stoeser*,¹⁰ was it

"charged or shown that the rates prescribed by the legislature were unreasonable, and the only question was the power of the legislature to interfere at all in the matter."

In the railroad cases, however, it was charged that the rates fixed by the statute of Nebraska were unreasonable and operated to deprive the railroad companies of their property without due process of law. The trial court found that this charge was sustained

⁵ Brooks Adams in *Centralization and the Law*, 123.

⁶ *Ibid.* 123, 124.

⁷ *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 86, 22 Sup. Ct. 30, 33 (1901).

⁸ 94 U. S. 113, 125 (1876). Chief Justice Waite pointed out that the regulation of rates did not necessarily deprive the elevator owner of his property; and that the Fourteenth Amendment simply prevents the States from doing that which will operate as such deprivation.

⁹ 143 U. S. 517, 12 Sup. Ct. 468 (1892).

¹⁰ 153 U. S. 391, 14 Sup. Ct. 857 (1894).

by the evidence, and the Supreme Court, after examining the evidence with great care, reached the conclusion

"that as to most of the companies in question, there would have been, under such rates as were established by the act of 1893, an actual loss in each of the years ending June 30, 1891, 1892 and 1893: and that in the exceptional cases above stated, when two of the companies would have earned something above operating expenses in particular years, the receipts or gains above operating expenses, would have been too small to affect the general conclusion that the act, if enforced, would have deprived each of the railroad companies involved in these suits of the just compensation secured to them by the Constitution."¹¹

No fair-minded person can read the set of cases referred to by Mr. Adams with any tolerance for the doctrine which he teaches. They do not furnish the slightest warrant for the assertion that the Supreme Court laid down one rule for grain elevators in *Munn v. Illinois*, and a different one in *Smyth v. Ames* for railroad companies, and did this because in the intervening years "the social equilibrium had shifted," and the investment in railways had increased from four and a half billions in 1876 to eleven and a half billions in 1898. Or, to use his words,

"As the social weight of railways has increased, so has the tenderness of the courts in regard to anything which may impair their revenue. . . . These great roads represented a vast power and were protected accordingly."

If that doctrine were sound, inasmuch as the total railway investment is now about eighteen billions, we should expect to find the Supreme Court going to all lengths in its protection of railway interests. In fact it maintains no such attitude. For example, the railroad companies have sought exemption from the Safety-Appliance Acts,¹² which seriously impair their revenue, but the

¹¹ *Smyth v. Ames*, 169 U. S. 466, 547, 18 Sup. Ct. 418, 434 (1898). In closing his opinion (and there was no dissent), Justice Harlan said: "It may be added that the conditions of business, so far as railroad corporations are concerned, have probably changed for the better since the decree below, . . . In that event, if the Circuit Court finds that the present condition of business is such as to admit of the application of the statute to the railroad companies in question without depriving them of just compensation, it will be its duty to discharge the injunction," and enforce the statute.

¹² Act of March 2, 1893, amended March 2, 1903, 32 Stat. at L. 943, c. 976.

Supreme Court has sustained their constitutionality;¹³ has declared that they impose an absolute duty on the railroads which cannot be escaped by the exercise of reasonable care,¹⁴ and that they apply to cars used in moving intrastate traffic on a railway which is a highway of interstate commerce.¹⁵

The statement that litigants of "vast power are protected accordingly," while weak litigants "fare in proportion to their weakness," reads like a fairy tale in the light of such decisions, and of those in the *Standard Oil*¹⁶ and in the *Tobacco Trust Cases*.¹⁷ It might be dismissed as a fairy tale, but for the mischief that it breeds. If law is invariably on the side of the heaviest social battalions, all that is necessary to transform the law breaker into the law maker is to shift the social equilibrium — to change the minority into the majority so as to overawe the courts. Such a doctrine leads directly to the recall of judges, otherwise the will of the dominant class might be balked by a judiciary, holding office for a fixed term, or for the life of its members; especially if it were old-fashioned enough to believe that its sworn duty consisted in earnestly endeavoring to do justice in each case, not in accordance with the membership of the litigants in the dominant class, but in accordance with established principles of law.

In a jurisdiction where the recall of judges prevails, we might expect to find legal rules fashioned and enforced from notions such as are described in the following extract:

"The Anglo-American law as to this liability [the liability of employer to employed] contains three rules which would seem to have been adopted with the idea of protecting the interests of the employer rather than those of the employed. They were furthermore adopted at a time when the political influence of the employed was not as great as that of the employer, and when it was considered expedient, if not necessary, to encourage where possible the investment of capital in industrial enter-

¹³ *St. Louis, Iron Mountain, etc. Ry. v. Taylor*, 210 U. S. 281, 295, 28 Sup. Ct. 616, 621 (1908): "It is said that the liability under the statute as thus construed, imposes so great a hardship upon the railroads that it ought not to be supposed that Congress intended it. . . . The argument of hardship is plausible only when the attention is directed to the material interest of the employer to the exclusion of the interest of the employee and of the public."

¹⁴ *Chicago, B. & Q. Ry. v. United States*, 220 U. S. 559, 31 Sup. Ct. 612 (1911).

¹⁵ *Southern Ry. v. United States*, 222 U. S. 8, 32 Sup. Ct. 2 (1911).

¹⁶ *Standard Oil Co. v. United States*, 221 U. S. 1, 31 Sup. Ct. 502 (1911).

¹⁷ *United States v. American Tobacco Co.*, 221 U. S. 106, 31 Sup. Ct. 632 (1911).

prises. They are, first, that an employer is not liable to an employee for the damages caused by a co-servant; second, that the contributory negligence of an employee shall be an absolute bar to the recovery from an employer of damages in cases in which the employee, as well as the employer, has been guilty of negligence; and, finally, that where an employee has knowledge of unsafe conditions, and, notwithstanding that knowledge, continues his work, he is to be deemed to have assumed the risk of his conditions."¹⁸

It will be observed that the foregoing doctrine is very similar to that propounded by Mr. Adams. The judiciary adopts rules of law with the idea of protecting the dominant class. At least the three rules in question were adopted with that idea. This is a grave charge against the English and American courts. Is it valid?

That it cannot be sustained, so far as the contributory negligence rule is concerned, is clear. This rule antedates all fellow-servant controversies, and was fully established by judicial decisions in law suits to which employer and employed were not parties. To quote from Mr. Beven:¹⁹

"The case usually referred to as the first which definitely formulated the rule of law is *Butterfield v. Forrester*.²⁰ Plaintiff, who was riding violently, rode against an obstruction in the highway placed there by defendant, and was injured. Bayley, J., directed the jury that, if a person riding with reasonable and ordinary care could have seen and avoided the obstruction, and if they were satisfied that the plaintiff was riding along the street extremely hard and without ordinary care, they should find for the defendant; which they accordingly did."

The rule was restated and applied in numerous cases, both in England and in this country, during the next thirty years, without any reference to controversies between employed and employer.²¹ When such controversies began to come before the courts, and the employer

¹⁸ Social Reform and the Constitution, 251.

¹⁹ Beven, Negligence, 3 ed., 150.

²⁰ 11 East 60 (1809).

²¹ See *Vanderplank v. Miller, M. & M.* 169 (1828) (action for running down a ship); *Lack v. Seward*, 4 C. & P. 106 (1829) (collision of two barges); *Vennall v. Garner*, 1 Crompt. & M. 21 (1832) (running down a ship by another); *Pluckwell v. Wilson*, 5 C. & P. 375 (1832) (collision between wagons); *Williams v. Holland*, 6 C. & P. 23 (1833) (driving chaise against cart); *Luxford v. Large*, 5 C. & P. 421 (1833) (loaded wherry swamped by a steam vessel); *Rathbun v. Payne*, 19 Wend. (N. Y.) 399 (1838) (collision between canal boats); *Hartfield v. Roper*, 21 Wend. (N. Y.) 615 (1839) (running over a child unattended in the highway).

* interposed the defense of contributory negligence against the employee, he was making no novel claim; he was not calling on the court for any class intervention on his behalf; and when the court upheld the defense, it was not adopting "a rule with the idea of protecting the interests of the employer rather than those of the employed." In one of the earliest cases,²² in which an employer successfully set up the defense of contributory negligence of the employee, the court said:

"The negligent act was as much the act of the plaintiff as of the defendant's foreman, and no man can, in any case, be allowed to recover a compensation for damages resulting from his own misconduct or negligence. A plaintiff suing for negligence must himself be without fault."

The Supreme Court of Michigan dealt with this defense in the same way, when it was interposed for the first time in that state by an employer against an employee.

"Where no other considerations interfere, it is a well settled rule that a person who has by his own negligence so far contributed to the injury done him that he might by the use of ordinary diligence or care, have avoided it, has no right of action."²³

No reference here to any novelty in the defense; no hint that the employer was invoking any principle peculiar to him or his class; no intimation by the court that it was formulating a rule in the interests of the employer. And not one of the authorities cited for the well-settled rule of contributory negligence, was connected with labor litigations.²⁴

Equally true is it that the rule, referred to in the above quotation, concerning the assumption of risk by the employee, is not peculiar to labor litigation, and was not adopted by the courts "with the idea of protecting the interests of the employer rather than those of the employed." The legal principle applied in this

²² *Brown v. Maxwell*, 6 Hill (N. Y.) 592 (1844).

²³ *Mich. Cent. Ry. v. Leahey*, 10 Mich. 193, 198 (1862), citing *Butterfield v. Forrester*, 11 East 60 (1809); *Marriott v. Stanley*, 1 M. & G. 568, 853 (1840) (plaintiff thrown against an obstruction put in the street by defendant); *Clayards v. Dethick*, 12 Q. B. 439 (1848) (plaintiff's horse killed while being led over a trench negligently left open by defendant).

²⁴ See cases in last note.

rule is very ancient. Mr. Beven²⁵ has traced its history from Homer, Aristotle, the Roman jurists and the Year Books to the present time. The topic is discussed very fully also by Mr. Labatt.²⁶ Both writers assure us that it had been accepted by the English courts as early as 1820, as authority for the rule that one who voluntarily exposes himself to a known and appreciated danger assumes the risk of the consequences. Both cite *Hott v. Wilkes*²⁷ in support of this statement; and Mr. Labatt calls attention to the close resemblance of the language of the judges, in that case, "to that which has become so familiar in employers' liability cases."²⁸ Moreover, he emphatically declares that the maxim of *volenti non fit injuria* is one of universal application, and that whether it is or is not available in a particular case cannot be affected by the mere fact that the relations of the parties to the action were for some purposes defined by the contract. Accordingly, when discussing the rule relating to the employee's assumption of risk, he cites indifferently authorities in which the defendant was the plaintiff's employer and those in which he was a stranger.²⁹

That he was quite justified in so doing cannot admit of doubt. The rule, that an employee who continues working in conditions known to him to be unsafe assumes the risk of those conditions, is the rule which is applied to a stranger who subjects himself to the same risk. For example: The plaintiff, a locomotive engineer, was injured by striking against an electric signal post, while leaning outside his locomotive and looking back to take a signal from the conductor. As the evidence showed that plaintiff knew the manner in which the road was constructed, and fully appreciated the danger attending his continuance in the unsafe conditions, he had assumed the risk and could not recover.³⁰ In another case, the plaintiff, a voluntary spectator at a display of fireworks, was injured by the explosion of a bomb. He was held to have assumed the risk of the unsafe conditions in which he voluntarily continued, and, therefore, to have barred himself from recovery.³¹ A similar decision has

²⁵ Beven, *Negligence*, 3 ed., 632 *et seq.*; "Volenti non fit Injuria," 8 *Journal of the Soc. of Comp. Leg. N. S.* 185.

²⁶ 1 Labatt, *Master and Servant*, chap. 20.

²⁷ 3 B. & Ald. 304 (1820).

²⁸ 1 Labatt, *Master and Servant*, 971, note 4.

²⁹ *Ibid.* 969.

³⁰ *Lovejoy v. Boston & Lowell Ry.*, 125 Mass. 79 (1878).

³¹ *Scanlon v. Wedger*, 156 Mass. 462, 31 N. E. 642 (1892), followed in *Frost v. Josselyn*, 180 Mass. 389, 62 N. E. 469 (1902).

been made in New York against a voluntary spectator at an automobile race.³² While these spectator decisions may be open to criticism on the ground that the defendants were engaged in illegal exhibitions, it is believed that no one has intimated that the rule of assumption of risk, which defeated the plaintiffs, was adopted with the idea of protecting the interests of fireworks exhibitors and auto-racers, rather than those of the spectators; nor that it was due to the fact that the political influence of the latter class was less than that of the former; nor that its genesis can be traced to the judicial disposition to encourage the investment of capital in the industrial enterprises connected with fireworks and automobiles.

Again the rule of assumption of risk which operates to defeat the employee who knowingly subjects himself to unsafe conditions, operates in the same way against a passenger riding on the front platform of a crowded electric car, knowing that there is a sign on the car stating a rule that "Passengers riding on the front platform do so at their own risk."³³ It operates, also, to defeat a pedestrian who voluntarily passes over an icy sidewalk, or street, knowing that it is dangerous, but believing that he can escape unharmed. He assumes the risk of the unsafe conditions.³⁴

On the other hand, the rule does not operate to defeat the plaintiff, unless he assumes the risk; and it operates in the same way whether the particular plaintiff is a servant of the defendant or a stranger. To illustrate: A season-ticket holder on defendant's line of railway slipped on the steps leading down to the passenger platform and was injured. He knew that the steps were covered with snow, and somewhat slippery, and that he could have reached the platform by other steps. The jury found that he was not guilty of contributory negligence, and the court ruled that he did not assume the risk of the unsafe conditions, unless it was shown that "he freely and voluntarily, with full knowledge of the nature and

³² *Johnson v. City of New York*, 186 N. Y. 139, 78 N. E. 715 (1906), followed in *Bogart v. City of New York*, 200 N. Y. 379, 93 N. E. 937 (1911).

³³ *Burns v. Boston El. Ry.*, 183 Mass. 96, 66 N. E. 418 (1903), distinguishing cases where the defendant had waived the rule against standing on the platform.

³⁴ *Wilson v. City of Charlestown*, 8 All. (Mass.) 137 (1864); *Wright v. City of St. Cloud*, 54 Minn. 94, 55 N. W. 819 (1893); *Friday v. City of Moorhead*, 84 Minn. 273, 87 N. W. 780 (1901); *Howey v. Fisher*, 122 Mich. 43, 80 N. W. 1004 (1899): "It is apparent from this testimony that the plaintiff knew of the risk of passing over this icy way, and assumed the risk of doing so. . . . The precise danger was before her, and she had it in mind at the time."

extent of the risk he ran, impliedly agreed to incur it.”³⁵ This case was cited by the Supreme Court of Massachusetts as precisely in point, where the plaintiff was a servant of defendant and had been injured by falling on slippery steps as she was leaving defendant’s mill at the end of her day’s work:³⁶

“The rule which we are considering applies only when the plaintiff has voluntarily assumed the risk. . . . Mere knowledge of a danger will not preclude a plaintiff from recovering unless he appreciates the risk. . . . We are of the opinion that it cannot be said, as a matter of law, that the plaintiff in the present case, in attempting to go down the steps voluntarily assumed a risk which she understood and appreciated, and which resulted in the accident.”

In a case between an employee and an employer, the Supreme Court of New Hampshire, when setting aside a nonsuit of plaintiff, said:

“One does not voluntarily assume a risk, within the meaning of the rule that debars a recovery, when he merely knows there is some danger, without appreciating the danger. One cannot be said, as a matter of law, to assume a risk voluntarily, though he knows the danger and appreciates the risk, if at the time, he was acting under such an exigency, or such an urgent call of duty, or such constraint of any kind, as in reference to the danger deprives his act of its voluntary character; or if, after discovering the master’s neglect, he has no opportunity to leave the service before the injury is received.”³⁷

It is submitted that the rule, as to assumption of risks incident to unsafe conditions, was not adopted with the idea of protecting the interests of the employer rather than those of the employed. On the contrary, it antedates labor litigation and always has been applied in accordance with the same principles, whether the plaintiff was a servant or a stranger.

Let us pass to a consideration of the remaining rule alleged to have had its origin in judicial favoritism for employers. In the passage heretofore quoted, it is formulated thus: “An employer is not liable to an employee for the damage caused by a co-servant.”

Perhaps the first comment that should be made is that “Anglo-

³⁵ *Osborne v. London & Northwestern Ry.*, 21 Q. B. D. 220, 224 (1888).

³⁶ *Fitzgerald v. Conn. Riv. Paper Co.*, 155 Mass. 155, 159, 162, 29 N. E. 464 (1891).

³⁷ *English v. Amidon*, 72 N. H. 301, 56 Atl. 548 (1903).

American law" does not contain and never has contained that unqualified rule.³⁸ The reports are replete with cases where the employer has been held liable, and has been compelled to pay an employee, for damages caused by a co-servant. If the harm-doing co-servant is incompetent or reckless, and defendant knew or ought to have known this, and the harm to plaintiff resulted from such unfitness, the master is liable.³⁹ He is liable, too, if the injury is due to an insufficient number of co-servants.⁴⁰ Again, if plaintiff's injury is due to a co-servant's neglect to perform the duty assigned him by the defendant of promulgating proper rules for the conduct of the defendant's business, the latter is liable.⁴¹ So is he liable if the employee's injury is owing to a co-servant's failure to perform the duty assigned him of providing a safe working place for the plaintiff,⁴² or safe tools and machinery with which

³⁸ See Lord Brougham's remark upon a similar misstatement of the rule by Lord Ardmillan: "But, my Lords, it is utterly unknown to the law of England, also." *Bartonshill Coal Co. v. McGuire*, 3 Macq. 300, 313 (1858).

³⁹ *Gilman v. Eastern Ry. Co.*, 10 All. (Mass.) 233 (1865); *Metropolitan El. Ry. v. Fortin*, 203 Ill. 454, 67 N. E. 977 (1903), affirming a judgment for \$15,000 in the employee's favor; *Walker v. Bolling*, 22 Ala. 294 (1853); *Cook v. Parham*, 24 Ala. 21 (1853); *Brown v. Levy*, 108 Ky. 163, 55 S. W. 1079 (1900); *Poirier v. Carroll*, 35 La. Ann. 699 (1883), recovery for \$2500; *Laning v. N. Y. Cent. Ry.*, 49 N. Y. 521 (1872), sustaining a verdict for \$10,000. Judge Folger's opinion is worthy of careful reading by anyone who would understand the conscientious striving of the judiciary to do its duty in this class of cases.

⁴⁰ *Flike v. B. & A. Ry.*, 53 N. Y. 549 (1873). Defendant had appointed sufficient brakemen to go with the train which parted and caused the injury, but one of them neglected to go. The negligence of the company consisted in not seeing to it that the train was sufficiently manned when it started, and it did not excuse itself by showing that if Loftus, the brakeman, had done his duty, the train would have been fully manned. The employer, not the co-employee of Loftus, assumed the risk of the latter's neglect of duty.

⁴¹ *Han. & St. J. Ry. v. Fox*, 31 Kan. 586, 596, 3 Pac. 320 (1884), affirming judgment for \$10,000 in favor of employee; *Pool v. Southern Pac. Ry.*, 20 Utah 210, 220, 58 Pac. 326 (1899), affirming judgment for \$12,000 in favor of employee's administratrix; *Madden v. Ry. Co.*, 28 W. Va. 610 (1886), sustaining verdict of \$6000.

⁴² *Kansas City, etc. Ry. v. Kier*, 41 Kan. 661, 21 Pac. 770 (1899), recovery for \$7000; *Breckenridge Co. v. Hicks*, 94 Ky. 362, 22 S. W. 554 (1893), judgment for \$4000 in employee's favor affirmed; *Snow v. Housatonic Ry.*, 8 All. (Mass.) 441, 447 (1864); *Babcock v. Old Colony Ry.*, 150 Mass. 467, 23 N. E. 325 (1890); *Donahue v. Boston & Me. Ry.*, 178 Mass. 251, 254, 59 N. E. 663 (1901), recovery for \$6500; *Balhoff v. Mich. C. Ry.*, 106 Mich. 606, 65 N. W. 592 (1895); *Drymala v. Thompson*, 26 Minn. 40, 1 N. W. 255 (1879); *Henry v. Wabash West. Ry.*, 109 Mo. 488, 494, 19 S. W. 239 (1891); *Cavanaugh v. O'Neill*, 27 N. Y. App. Div. 48, 51, 50 N. Y. Supp. 207 (1898), affirmed without opinion in 161 N. Y. 657, 57 N. E. 1106 (1900); *Chesson v. John L. Roper L. Co.*, 118 N. C. 59, 61, 23 S. E. 925 (1896); *Calvo v. Railway Co.*, 23 S. C. 526

to work,⁴³ or of properly warning him of danger attending the work.⁴⁴ The authorities cited for the master's liability in such cases could be multiplied many times.

It is quite clear, therefore, that the quotation given above does not correctly state the fellow-servant rule. The master's exemption from liability to a servant for the negligence of a fellow servant is not unqualified. On the contrary it is conditioned upon his having performed his legal duties towards the plaintiff. The existing rule is often criticized, as throwing the entire risk of fellow service upon the employee. The foregoing authorities show that this criticism is unwarranted. Every large employer of labor takes the risk of his servants' negligence, even towards fellow servants, in doing numberless acts which he has deputed to them, and must necessarily depend upon them to do. That risk the much-abused common law fastens upon him. A servant does not assume the risk of a co-servant's negligence in providing unfit fellow servants, or an insufficient number of fit ones; nor in providing a safe place to work; nor in providing safe tools; nor in formulating proper rules; nor in giving due warning of danger. And these, as the law reports show, embrace a large proportion of the risks of fellow service.

Returning now to the fellow-servant rule, as thus limited, let us inquire whether there is any evidence to sustain the charge that it was "adopted with the idea of promoting the interests of the employer rather than those of the employed." It is to be borne in mind that we are not now concerned with the wisdom or folly

(1885); *Openshaw v. Railway Co.*, 6 Utah 132, 136, 21 Pac. 999 (1889), affirming judgment for plaintiff for \$5000; *Moon's Admr. v. R. & A. Ry.*, 78 Va. 745, 752 (1884); *B. & O. Ry. v. McKenzie*, 81 Va. 71, 77 (1885); *McDonough v. Great Northern Ry.*, 15 Wash. 244, 257, 46 Pac. 334 (1896); *Davis v. Cent. Vt. Ry.*, 55 Vt. 84 (1882), sustaining verdict for \$5000.

⁴³ *Hough v. Railway Co.*, 100 U. S. 213 (1879); *Northern Pac. Ry. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590 (1885), affirming judgment for \$15,000 in employee's favor; *Union Pac. Ry. v. Daniels*, 152 U. S. 684, 14 Sup. Ct. 756 (1894), affirming s. c. 6 Utah 357, 23 Pac. 762, upholding employee's verdict for \$10,000; *Port Blakely Mill Co. v. Garrett*, 97 Fed. 537 (1899), affirming judgment for \$5000; *Fuller v. Jewett*, 80 N. Y. 46 (1880).

⁴⁴ *Tedford v. Los Angeles Tel. Co.*, 134 Cal. 76, 66 Pac. 76 (1901), sustaining verdict for \$15,000; *Daly v. Kiel*, 106 La. 170, 30 So. 254 (1901), affirming judgment for \$1500; *Bjbjian v. Woonsocket R. Co.*, 164 Mass. 214, 41 N. E. 265 (1895); *Brennan v. Gordon*, 118 N. Y. 489, 23 N. E. 810 (1890); *Kielley v. Belcher Silver Min. Co.*, 3 Sawy. (U. S.) 437 (1875); *The Pioneer*, 78 Fed. 600 (1897), sustaining a verdict for \$5000.

of the rule, but with its genesis. Does it owe its existence to the political weakness of the employed and to the disposition of courts to encourage the investment of capital in industrial enterprises? Is it the expression of class selfishness by judges who were members of that class?

A satisfactory answer requires a careful examination of the leading cases on this topic. Such an investigation is somewhat tedious but it ought to yield safer results than the most brilliant speculation.

The first attempt under English common law to hold a master liable to a servant for the negligence of a co-servant, was made in *Priestley v. Fowler*.⁴⁵ The plaintiff was injured by the breaking of a butcher's van on which he was riding pursuant to the directions of its owner, who was his master as well as the master of the "conductor" of the van. Plaintiff's counsel contended that there was "no valid distinction between this case and that of an ordinary coach passenger"; and that defendant was liable even though he did not know that the van was overloaded. This view was rejected by the court. Lord Abinger, speaking for a unanimous court,⁴⁶ pointed out some of the absurd and inconvenient consequences which he believed would follow from the adoption of the principle contended for by plaintiff. Most of them relate to the everyday experience of the ordinary head of a family, and not one reveals any thought on the part of the judges, that their refusal to sustain this absolutely novel action would tend to encourage the investment of capital in industrial enterprises.

The next case in chronological order is *Murray v. Railroad Company*.⁴⁷ Plaintiff, a fireman in defendant's employ, claimed to have been injured through the negligence of the engineer, and

⁴⁵ 3 M. & W. 1 (1837). Lord Abinger said, at p. 5, "It is admitted that there is no precedent for the present action by a servant against a master."

⁴⁶ The court consisted of Lord Abinger, C. B., and Barons Parké, Bolland, Alderson and Gurney. The correlative duties of master and servant are referred to at p. 6: "The master is no doubt bound to provide for the safety of his servant in the course of his employment, to the best of his judgment, information and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself."

⁴⁷ 1 McMul. (S. C.) 385 (1841). As *Priestley v. Fowler* is not referred to by counsel or judges, it is safe to conclude that the decision was not brought to the attention of the South Carolina court. The judges of this court were elected by the members of the two houses of the legislature, and held office during good behavior.

recovered a verdict of \$1500, under the charge of the trial judge, that if the engineer did his duty so carelessly as to subject plaintiff to unnecessary danger which he could not avoid, the company would be liable. On appeal, the Court of Errors, by a vote of seven to three, held that the charge was erroneous and ordered a new trial. It may be noted, in passing, that the dissenting, as well as the prevailing, opinions agree that contributory negligence on the plaintiff's part would bar a recovery, and that he assumed "the ordinary risks and perils of the employment." Nothing can be found in any of the opinions indicative of judicial bias in favor of employers, nor does the argument for the defendant (which is printed in full) ask for any favors to his client or to the class to which that client belonged.⁴⁸ The decision was placed upon three grounds: First, that there was no "precedent suited to the plaintiff's case, unless he stands in the relation of a passenger to the company." Second, that plaintiff's contention that he was a passenger, when injured, was unsound, and that he was not entitled to the rights of a passenger against the defendant. Third, that it was not incident to plaintiff's contract of hiring that the company should guarantee him against the negligence of his co-servants.

Next comes *Farwell v. Boston & Worcester Ry.*,⁴⁹ in which the fellow-servant doctrine received its classical exposition in a carefully prepared opinion by Chief Justice Shaw. In this case plaintiff's counsel did not claim that his client was a passenger, as did counsel in *Priestley v. Fowler* and *Murray v. Railroad Company*.

⁴⁸ 1 McM. (S. C.) 388-398. Defendant's counsel reminded the court that a correct decision in the case was of less account to the railroad than to the public. "The company can make its contracts with its servants so as to avoid liability, if the verdict should be sustained." Much of his argument is addressed to showing that public security would not be promoted by the doctrine contended for by the plaintiff. He lays much stress upon the novelty of the action. After stating that defendant warranted to plaintiff that its road was in ordinary repair, that its engine was good, and the engineer competent, and that it would be liable to him for an injury due to its fault in any of these respects, he adds, "But the company cannot be supposed to warrant that each servant shall always be watchful, and that no servant shall be injured by the negligence of another."

⁴⁹ 4 Met. (Mass.) 49 (1842). The members of the court were appointed by the Governor with the consent of the Council, to hold office during good behavior. The case was argued upon an agreed state of facts, one of which was that plaintiff received higher wages as an engineer than he had received as machinist. Another was that plaintiff when he entered defendant's employment knew the switchman, and knew that he was a careful and trustworthy servant.

In fact, he admitted that those cases were rightly decided, since the plaintiff "was jointly engaged in the same service with the other servant, whose negligence caused the injury" and therefore, it might reasonably be inferred that they took "the hazard of injuries from each other's negligence." He insisted, however, that Farwell, as engineer, was engaged in a distinct employment from that of the switchman whose negligence caused plaintiff's injury, and that "a master, by the nature of his contract with a servant, stipulates for the safety of the servant's employment, so far as the master can regulate the matter." If we pass to the argument for defendant⁵⁰ and to the opinion of the court, we shall find no more trace of class partisanship than in the argument by plaintiff's counsel. The plaintiff was defeated because there was no precedent for his action, and because "considerations as well of justice as of policy" precluded the court from accepting the rule contended for by the plaintiff. It could find no ground upon which to base an implied promise of indemnity by the master to a servant against the negligence of fellow servants, where the master was without fault. The liability of a master to strangers for the negligence of a servant stands on its own reasons of policy. To extend that liability to co-servants would not conduce to the general good. The plaintiff had voluntarily left a position as machinist, and entered upon his employment as engineer, for higher wages, and with full knowledge of the risks incident to the latter employment. The injury must be deemed the result of an accident, not of a breach of duty owing by the defendant to the plaintiff. Such is the view of the court.

Justice Holmes has expressed the opinion that "few have lived who were Chief Justice Shaw's equals in their understanding of the grounds of public policy to which all laws must ultimately be referred. It was this which made him, in the language of the late Judge Curtis, the greatest *magistrate* which this country has produced."⁵¹ It may be that the great magistrate's "understanding of the grounds of public policy" failed him in the Farwell case;

⁵⁰ 4 Met. (Mass.) 53-55. Counsel for defendant contended that the risk of passengers would be increased if the principle contended for by plaintiff was adopted, for it would diminish the caution of railroad servants. He also insisted that the plaintiff was paid higher wages because of the increased risk which he had assumed, including the risk of co-servants' negligence.

⁵¹ The Common Law, 106. The italics are the author's.

that his conceptions of "justice and policy" and of the principles which best "conduce to the general good," were egregious blunders; but it is certain that he nowhere betrays any disposition to formulate a rule which should protect the employer rather than the employed, or one which should encourage the investment of capital; nor does he appear to be swayed by the political influence of the employer class. Indeed, he did not understand that he was taking part in the adoption of a new rule at all. He was simply expounding established principles of the common law.

That Chief Justice Shaw did not blunder in the *Farwell* case was the accepted view of the bench and bar for a generation. Not only was his opinion treated in this country as unassailable, but it received the rare compliment of being followed by the House of Lords and reprinted in a volume of its reports.⁵² Two years after the *Farwell* decision, the Supreme Court of New York declared that it "entertained no doubt of its correctness."⁵³ A few years later it was unhesitatingly followed by the New York Court of Appeals.⁵⁴ Meanwhile the Supreme Court of Georgia accepted the doctrine of the *Farwell* case but declined to apply it against the owner of a slave, who had been killed by the negligence of defendant's free servants, on the ground that "slaves dare not intermeddle with those around, embarked in the same enterprise with themselves."⁵⁵ Later, it was not only accepted but applied in that state in the case of a free fellow servant.⁵⁶

The Supreme Court of Ohio was divided in the first fellow-servant case that came before it,⁵⁷ but later accepted the *Farwell* doctrine, with the qualification that the servants are engaged in a

⁵² 3 Macq. 316-322 (1858).

⁵³ *Brown v. Maxwell*, 6 Hill (N. Y.) 592 (1844). The members of this court were appointed by the governor.

⁵⁴ *Coon v. Syracuse & Utica R. Co.*, 5 N. Y. 492 (1851), affirming s. c. 6 Barb. (N. Y.) 231 (1849). The judges of these courts were elected by popular suffrage. At p. 495 of 5 N. Y. Gardiner, J., said: "To the elaborate opinion of Chief Justice Shaw, nothing can be added without danger of impairing the force of his reasoning." In the court below, Pratt, J., remarked, "The correctness of these decisions [in the *Farwell* and *Priestley* cases] was not seriously questioned by the able counsel for the plaintiff, upon the argument of this cause." 6 Barb. (N. Y.) 236.

⁵⁵ *Scudder v. Woodbridge*, 1 Kelly (Ga.) 195 (1846).

⁵⁶ *Shields v. Yonge*, 15 Ga. 349 (1854). The members of this court were elected for three years by popular suffrage.

⁵⁷ *Little Miami R. Co. v. Stevens*, 20 Oh. 415 (1851). The judges were appointed to office for a term of seven years, by joint ballot of the two houses of the legislature.

common employment and are of equal rank.⁵⁸ The doctrine was accepted also by the Supreme Court of Louisiana in 1851,⁵⁹ by the Alabama Supreme Court in 1853,⁶⁰ and the following year by the Supreme Court of Pennsylvania in an opinion of commanding ability.⁶¹ During the same year the Illinois Supreme Court accepted it,⁶² followed a few months later by the highest court of Indiana.⁶³ Whether the reasons assigned by these courts, and quoted in the

⁵⁸ *Cleveland, etc. R. Co. v. Keary*, 3 Oh. St. 201 (1854); *Whaalan v. Mad River, etc. R. Co.*, 8 Oh. St. 249 (1858). The judges, during this period, were elected by popular suffrage for terms of seven years.

⁵⁹ *Hubgh v. New Orleans & C. R. Co.*, 6 La. Ann. 495 (1851), questioned by a part of the court in *Camp v. Church Wardens*, 7 La. Ann. 321 (1852), but now admitted to be correct. *Weaver v. Goulden Logging Co.*, 116 La. 467, 471, 473, 40 So. 798 (1906). The judges in 1851 and 1852 were elected by white male suffrage. In the *Camp* case will be found a full discussion of French decisions bearing on the topic, as well as of the provisions of the Louisiana Code.

⁶⁰ *Walker v. Bolling*, 22 Ala. 294 (1853), although the defendant was held liable because of the unfitness of the negligent co-servant. The judges were elected for a term of six years by the joint ballot of both houses of the legislature.

⁶¹ *Ryan v. Cumberland Valley R. Co.*, 23 Pa. St. 384 (1854). Said the Court: "The argument that the law implies a warranty that one servant shall not be injured by the carelessness of another, is only another way of stating the proposition that the law imposes the duty of protection on the master, which implies the relation of dependence on the part of the servant. . . . Such a rule could have very little application to great corporations, for they would immediately act on the maxim, *conventio vincit legem*, and provide against it in their contracts. But it would live to embarrass the more private and customary relations, and be the source of abundant litigation." The judges were elected by popular suffrage for a term of fifteen years.

⁶² *Honner v. Ill. Cent. R. Co.*, 15 Ill. 550 (1854); *Ill. Cent. R. Co. v. Cox*, 21 Ill. 20 (1858). After citing many authorities in support of the doctrine, the court expressed its approval of it as correct upon principle, declaring that it operated to make servants prompt and vigilant in reporting unfit or negligent co-servants. It was in accord, too, with the implied contract of the servant who calculates the hazards incident to a business in which he engages. "This we see every day — dangerous service generally receiving higher compensation than a service unattended with danger or any considerable risk of life or limb." The judges were elected by popular suffrage.

⁶³ *Madison, etc. R. Co. v. Bacon*, 6 Ind. 205 (1855): "It is considered that public policy requires that servants engaged in a common employment should not have an action against their principal for injuries resulting from the negligence of one or more of such servants; because the tendency of such a doctrine is to make them anxious and watchful and interested for the faithful conduct of each other, and careful to induce it; while the opposite doctrine would tend in a different direction. The safety and welfare of the public, therefore, demand the establishment of the non-liability principle on the part of the employer in such cases; while, when established, it can work no injury to the servant, because his entering upon the service is voluntary, is with a knowledge of its hazards, and with a power and right to demand such wages as he shall deem compensatory." The judges of the court were elected by popular suffrage.

notes, are sound or unsound when tested by modern economic theories, is quite irrelevant to our present inquiry. They were the reasons which influenced judicial action.

They were approved by the Supreme Court of Vermont, in a case which also held the master liable to a servant for injury due to the failure of other servants to inspect and repair a defective engine.⁶⁴ These reasons were repeated by the Supreme Court of Maine, when declaring that

"at common law an action for damages by a servant for an injury occasioned by the carelessness of a fellow servant in the same service, cannot be maintained against their common employer unless there be some contributing fault on his part."⁶⁵

They appear again in a Delaware case,⁶⁶ as supporting "a general principle of law," as they do in a North Carolina case, the following year, which calls attention, also, to the oft-noted fact that there was no common-law precedent for such an action as the plaintiff had brought.⁶⁷

The Supreme Court of New Hampshire subjected the fellow-servant doctrine to a very careful study and reached the conclusion that

"the law on this subject is not peculiar to common carriers, railroads, or extensive enterprises. The responsibilities of the defendants, in this case, and of the individual who hires two laborers in harvest, or two carpenters to erect a staging and shingle his house, are to be determined by the same legal tests. . . . The servant has agreed to bear, and is paid for bearing the risks incident to the service; the stranger has not made such an agreement, and is not paid for bearing such risks."⁶⁸

⁶⁴ *Noyes v. Smith*, 28 Vt. 59 (1855). The judges were chosen by the two houses of the legislature and the council for a term of two years. See *Fox v. Sandford*, 4 Sneed (Tenn.) 36, 47 (1856). Judges were elected by white male suffrage.

⁶⁵ *Carle v. Bangor, etc. Canal & R. Co.*, 43 Me. 269 (1857). The judges were appointed by the governor with the consent of the council for four years.

⁶⁶ *Flinn v. Philadelphia, etc. R. Co.*, 1 Houst. (Del.) 469, 496 (1857). Judges appointed by the governor and held office during good behavior. The doctrine is again recognized in *Taylor v. Bush & Sons Co.*, 6 Pennewill (Del.) 306 (1907).

⁶⁷ *Ponton v. Wilmington, etc. R. Co.*, 51 N. C. 245 (1858). Judges were appointed by the governor to hold office during good behavior.

⁶⁸ *Fifield v. Northern Railroad*, 42 N. H. 225, 238, 239 (1860). The defendant's demurrer was overruled, as plaintiff charged that his injury was due to defendant's failure to provide a safe place to work as brakeman. For such failure, whether through the negligence of a manager or a co-servant, defendant was liable. Judges were appointed by governor and council.

Wisconsin shows considerable judicial vacillation on this subject. In *Chamberlain v. Mil. & Miss. R. Co.*⁶⁹ the Supreme Court approved a charge of the trial court laying down the prevailing doctrine. When the case came before the court a second time, a majority rejected that doctrine,⁷⁰ but it was reinstated by a divided court a few years later.⁷¹ This last change of view was induced, said Dixon, C. J., by

"the unbroken current of judicial opinion. At the time the second decision was announced, it was supposed that its doctrine had been or would be sustained by the courts of Ohio and Indiana; but by the reports which have more recently reached us it appears that they hold the very opposite, so that now the case (in 11 Wis.) stands alone in opposition to the decisions of all the courts of both countries, and I think, with Justice Cole, that it must be overruled."

From this time on the current of judicial opinion in the state courts of last resort continues unbroken, although individual judges criticized the accepted doctrine now and then; and in a few jurisdictions it suffered minor modifications.⁷²

⁶⁹ 7 Wis. 425 (1859).

⁷⁰ 11 Wis. 238 (1860).

⁷¹ *Moseley v. Chamberlain*, 18 Wis. 700, 705 (1860). The judges were elected by popular suffrage.

⁷² *McDermott v. Pacific R. Co.*, 30 Mo. 115 (1860). Judges were elected by white male suffrage. *Sullivan v. Miss. & Mo. R. Co.*, 11 Ia. 421, 427 (1860). Judges elected by popular suffrage. *Michigan Cent. R. Co. v. Leahey*, 10 Mich. 193, 199 (1862). Judges elected by popular suffrage. *O'Connell v. B. & O. R. Co.*, 20 Md. 212, 221 (1863). Judges appointed by the governor with the consent of the senate. *Harrison v. Central R. Co.*, 31 N. L. J. 293, 296 (1865). Judges appointed for six years by the governor with the consent of the senate. *Louisville & Nash. R. Co. v. Collins*, 63 Ky. 114 (1865). Doctrine limited to co-equal servants. Judges elected for eight years by white male suffrage. *Burke v. Norwich, etc. R. Co.*, 34 Conn. 474 (1867). The soundness of the doctrine is questioned, but the court accepts it as well established. Judges appointed by the general assembly for eight years. *Foster v. Minn. Cent. R. Co.*, 14 Minn. 360, 362 (1869). Judges elected by popular suffrage. *Dow v. Kan. Pac. Ry. Co.*, 8 Kan. 642, 645-646 (1871). The fellow-servant rule is approved as in accordance with "both authority and reason" and as securing the personal safety of passengers and "insuring the most skillful and trustworthy agents and servants." Judges elected by popular suffrage. *Yeomans v. Contra Costa, etc. Co.*, 44 Cal. 71, 81 (1872). Judges elected by popular suffrage. *N. O., J. & G. N. R. Co. v. Hughes*, 49 Miss. 258 (1873). The fellow-servant doctrine, after a careful examination of authorities, is approved, because it safeguards the public without injustice to the employee. Judges appointed by the governor with the consent of the senate. *Summerhays v. Kan. Pac. R. Co.*, 2 Colo. 484, 488 (1875). Judges elected by popular suffrage. *Price v. Houston, etc. Nav. Co.*, 46 Tex. 535, 537 (1877). Judges elected by popular suffrage. *Little Rock, etc. R. Co. v. Duffey*, 35 Ark. 602, 613 (1880). Judges elected by popular suffrage.

The doctrine appears to have been brought before the United States Supreme Court for the first time in 1873, but the court found its discussion unnecessary in either of the pending cases. In one,⁷³ the relation of servant and master did not exist between the plaintiff and defendant, at the time of injury; and in the other,⁷⁴ the plaintiff was the father of the injured servant, and "the injury did not occur while the boy was doing what his father engaged he should do." That the court felt no partisanship for corporation employers, however, is apparent from the following language in the second case:

Chicago, etc. Ry. Co. v. Lundstrom, 16 Neb. 254 (1884). Modifies the prevailing doctrine by permitting a servant to recover against the master for negligence of a superior servant. Judges elected by popular suffrage. Willis v. Oregon Ry. & Nav. Co., 11 Or. 257, 263, 4 Pac. 121 (1884). Judges elected by popular suffrage. Moon's Admr. v. R. & A. R. Co., 78 Va. 745 (1884). Judges elected by joint assembly of the two houses. Madden's Admr. v. C. & O. Ry. Co., 28 W. Va. 610 (1886). General doctrine accepted as one of common law, but does not apply when the negligent co-servant acts in a superior capacity to the plaintiff in regard to some duty due to the master. Judges elected for twelve years by popular suffrage. Gaffney v. N. Y., etc. R. Co., 15 R. I. 456, 459, 7 Atl. 284 (1887). Judges elected by the general assembly and hold office during its pleasure. Openshaw v. Utah, etc. R. Co., 6 Utah 132, 21 Pac. 999 (1889); Daniels v. Union Pacific Ry. Co., 6 Utah 357, 23 Pac. 762 (1890); Dryburg v. Mercer Gold Mining, etc. Co., 18 Utah 410, 55 Pac. 367 (1898). In the last cited case the court reviews the history of the fellow-servant doctrine, criticizes Chief Justice Shaw's opinion, and concludes that fellow servants are those who "are working together at the same time and place and to a common purpose," applying Rev. Stat. § 1343. The cases in 6 Utah were decided by judges appointed by the President; that in 18 Utah by judges elected by popular suffrage. The Daniels case was affirmed by the Supreme Court, 152 U. S. 684, 14 Sup. Ct. 756 (1894), on the ground that the negligent servant had failed to provide safe instrumentalities for the plaintiff. McBride v. Union Pac. Ry. Co., 3 Wyo. 247, 21 Pac. 687 (1889). Judges appointed by the President. Parrish v. Pensacola, etc. R. Co., 28 Fla. 251, 278 (1891). Judges elected by popular suffrage. Ell v. Northern Pac. R. Co., 1 N. D. 336, 48 N. W. 222 (1891). The opinion of Corliss, C. J., gives unqualified approval of the fellow-servant doctrine as just, wise and beneficial to the public at large, as well as a correct deduction from common-law principles. Judges elected by popular suffrage. Lutz v. Atl. & Pac. R. Co., 6 N. M. 496, 30 Pac. 912 (1892). Accepts the doctrine without hesitation as sound common law, and holds that it had not been affected by §§ 2308-2310 of Comp. Laws. Judges appointed by the President. Gates v. Chic., Mil. & St. P. R. Co., 2 S. D. 422, 50 N. W. 907 (1892). Judges elected by popular suffrage. Zintek v. Stimson Mill Co., 6 Wash. 178, 32 Pac. 997, 33 Pac. 1055 (1893). Judges elected by popular suffrage for six years. McDonough v. Great Northern Ry. Co., 15 Wash. 244, 46 Pac. 334 (1896), but sustaining recovery because defendant had failed to provide a safe place to work. Goodwell v. Mont. Cent. Ry. Co., 18 Mont. 293, 45 Pac. 210 (1896). Judges elected by popular suffrage. Ruemmeli-Braun Co. v. Cahill, 14 Okl. 422, 79 Pac. 260 (1904). Judges appointed by the President.

⁷³ Packet Co. v. McCue, 17 Wall. (U. S.) 508 (1873).

⁷⁴ Railroad Company v. Fort, 17 Wall. (U. S.) 553, 557-558 (1873).

"This rule proceeds on the theory that the employee, in entering the service of the principal, is presumed to take upon himself the risks incident to the undertaking, among which are to be counted the negligence of fellow servants in the same employment, and that considerations of public policy require the enforcement of the rule. But this presumption cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it. If it were otherwise, principals would be released from all obligations to make reparation to an employee in a subordinate position for any injury caused by the wrongful conduct of the person placed over him, whether they were fellow servants in the same common service or not. Such a doctrine would be subversive of all just ideas of the obligations arising out of the contract of service, and withdraw all protection from the subordinate employees of railroad corporations. These corporations, instead of being required to conduct their business so as not to endanger life, would, so far as this class of persons were concerned, be relieved of all pecuniary responsibility in case they failed to do it. A doctrine that leads to such results is unsupported by reason and cannot receive our sanction."

The fellow-servant doctrine did receive careful consideration from the Supreme Court in *Hough v. Railway Company*.⁷⁵ It was dealt with as a doctrine dependent upon principles of general law, and not controlled by the decisions of the state courts. Nevertheless the court reached the conclusion which had been reached with substantial unanimity by the state courts. That the judges were not accepting a rule "with the idea of protecting the interests of the employer rather than those of the employed," must be admitted by anyone who reads the opinion in which Justice Harlan spoke for a unanimous court. It is clear that the dominant motive, plainly expressed, is to formulate a doctrine which should be as nearly just as possible to both employee and employer; and the decision in the particular case was in favor of the employee.

This review of judicial decisions shows that the fellow-servant rule is not a product of judicial legislation. It is simply a formulation of common-law doctrine that had been tacitly accepted by

⁷⁵ *Hough v. Railway Co.*, 100 U. S. 213 (1879). At pp. 217 and 218, the court expressly declares that the master is bound to exercise due care in providing reasonably safe instrumentalities in his business and in maintaining them in such condition; and that he cannot in respect of such matters interpose between himself and the servant, who has been injured without fault on his part, the personal responsibility of an agent who in exercising the master's authority has violated the duty he owes as well to the servant as to the master.

the bench and bar, until near the middle of the nineteenth century. It did not deprive the employee of any right theretofore accorded him by English law, or claimed by him. The novelty was not in the doctrine expounded in the cases above reviewed, but in the plaintiff's statement of a cause of action. The books contained no precedent for his declaration. In the two earliest cases ⁷⁶ he sought to recover in the capacity of a passenger. Clearly, his master did not sustain the relation to him of common carrier. In the next case, ⁷⁷ he abandoned the ground taken by his predecessors and based his action on an implied contract of indemnity with his employer. Just as clearly he was wrong again. The unanimity with which American courts accepted the fellow-servant doctrine is most persuasive evidence that it was an accurate deduction from common-law principles. Whether the judges were appointed by the governor, or chosen by the legislature, or elected by popular suffrage; whether their term of office was for life, or a short term of years, or during the pleasure of the electors; whether they were Websterian Whigs, or Jacksonian Democrats, or Lincoln Republicans; whether serving an Eastern, or a Western, or a Northern or a Southern community, everywhere and always the courts were agreed that the fellow-servant rule was only the formulation of common-law doctrine.

Such has been the opinion in England. To quote from Lord Cranworth: ⁷⁸

"That this is the view of the subject in England cannot I think admit of doubt. It was considered by the Court of Exchequer in *Priestley v.*

⁷⁶ *Priestley v. Fowler*, 3 M. & W. 1 (1837); *Murray v. Railroad Co.*, 1 McMul. (S. C.) 385, 399 (1841). Evans, C. J., says: "But the plaintiff is neither a stranger nor a passenger, and if he can recover, it must be in his hermaphrodite character as a passenger fireman."

⁷⁷ *Farwell v. Boston & Worcester Ry.*, 4 Met. (Mass.) 49 (1842). See argument of plaintiff's counsel at pp. 51-53.

⁷⁸ *Bartonshill Coal Co. v. Reid*, 3 Macq. 266, 285 (1858). He adds: "The law, as established in England, is founded on principles of universal application, not on any peculiarities of English jurisprudence; and unless there has been a settled course of decision in Scotland to the contrary, I think it would be most inexpedient to sanction a different rule to the north of the Tweed from that which prevails to the south." He then proceeds to a consideration of Scotch decisions and finds that each one would have been decided as it was, had it come before an English court — the negligence of the fellow servant having been in respect to a duty which the master delegated to a servant at his peril.

Fowler, afterwards fully discussed in the same Court in *Hutchinson v. The York, Newcastle, & Berwick Railway Company*, and acted on by the same Court in *Wigmore v. Jay*. Those decisions would not, it is true, be binding on your Lordships if the ground on which they rested were unsound, but the circumstance of their having been acquiesced in affords a strong argument to show that they have been approved of; more especially as in the first two cases the question appeared on the record, and might have been brought before a Court of Error."

On the same occasion Lord Chancellor Chelmsford, when concurring with Lord Cranworth's conclusion that there was no real difference in the law of England and Scotland on this topic, remarked: ⁷⁹

"The decisions upon the subject in both countries are of recent date, but the law cannot be considered to be so; the principles upon which these decisions depend must have been lying deep in each system, ready to be applied when the occasion called them forth."

If anyone fancies that the learned Lords, who decided the cases last cited, were partisans of the employer class, let him read for disillusionment the cases of *Patterson v. Wallace & Co.*,⁸⁰ and *Brydon v. Stewart*.⁸¹

Persons who criticize the courts for the fellow-servant doctrine forget (possibly they do not know) that the common-law liability of the master for the negligence of his servant rests upon judicial decisions, and that it was not fully established in its present broad form until the nineteenth century.⁸² Indeed, the leading cases upon this topic, those in which the principles underlying the doctrine are most fully and satisfactorily expounded, are also the leading cases in the fellow-servant group.⁸³ Now it is quite certain that

⁷⁹ *Bartonshill Coal Co. v. McGuire*, 3 Macq. 310 (1858).

⁸⁰ 1 Macq. 748, 750, 758 (1854). In *Vose v. Lancashire & Yorkshire Ry. Co.*, 2 H. & N. 728, 734 (1858), Pollock, C. B., said: "The law must have been the same long before it was enunciated in *Priestley v. Fowler*. If not, such actions would have been of frequent occurrence."

⁸¹ 2 Macq. 30, 35, 38 (1855).

⁸² See *Wigmore, Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 383-405.

⁸³ Lord Justice Brett declared that *Hutchinson v. York, Newcastle & Berwick Ry. Co.*, 5 Exch. 343 (1850), "is always considered the leading case on the subject" of master's liability, as well as on the fellow-servant topic. *Employer's Liability Report to Parliament*, 1877, p. 115. Among the leading cases in this country are, without doubt, *Murray v. Railroad Co.*, 1 McMUL. (S. C.) 385 (1841); *Farwell v.*

the general doctrine of the master's liability for the negligence of his servant, under modern common law, is not one which operates in favor of the employer. On the contrary it subjects him to a heavier burden than is laid upon him in most systems of jurisprudence. And yet that doctrine was developed and has been maintained by the very courts that are charged with creating the fellow-servant rule out of their zealous tenderness for the employer. Our courts are criticized for a harshness of doctrine towards the employee, not found in the judicial decisions of Continental states. Have they ever been praised for a harshness towards the employer, which is likewise absent from such decisions?

It would be a strange situation, surely, if the courts were at the same time enemies and partisans of the employer class. Is it not more probable that they were neither enemies nor partisans; but that, in formulating the general doctrine of the master's liability to strangers as well as the special fellow-servant doctrine, they were striving to do what seemed to them right and wise? They may have erred. Is there any evidence that they were actuated by discreditable or selfish motives?

The writer holds no brief for the impeccability of judges or the infallibility of courts.⁸⁴ But a careful and, he trusts, a candid study of the decisions of English and American courts during many years, has convinced him that the body of law thus developed is not the expression of class selfishness. On the contrary it seems to him an honest, and in the main an adequate system of principles under which justice can be fairly administered between litigants without respect to class, or rank, or condition.

Francis M. Burdick.

COLUMBIA LAW SCHOOL.

Boston & Worcester Ry., 4 Met. (Mass.) 49 (1842); *Coon v. Syracuse & Utica Ry.*, 6 Barb. (N. Y.) 231, 238 (1849); *Ryan v. Cumberland Valley R. Co.*, 23 Pa. St. 384 (1854).

⁸⁴ See Walter D. Coles, "Politics and the Supreme Court of the United States," 27 Am. L. Rev. 182.

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CONSTITUTIONALITY OF INSURANCE RATE REGULATION. — Almost all statutory regulation of insurance imposes a sufficient restriction on a pre-existing liberty of contract to present a *prima facie* case within the inhibition of the "due process" clauses of the federal and state constitutions,¹ and calls for justification as an exercise of some of those legislative powers which are available in spite of those constitutional prohibitions. The larger part of American legislation on insurance has operated to protect the public against fraudulent and insolvent underwriters and to assure policy holders of the performance of the promises made to them. As an appropriate means of effecting this result it has been held proper to restrict the business to corporations;² to require a specified capital;³ to forbid discrimination and rebating;⁴ and to compel the issuance of valued fire policies.⁵ That the attainment of this object is a legitimate exercise of the police power in the narrower sense, the promotion of the health, morals, safety, and welfare of the public, is well settled.⁶ The prevention of monopoly is another well-settled branch of the police power and has been upheld in its application to insurance.⁷

¹ *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427.

² *Commonwealth v. Vrooman*, 164 Pa. St. 306, 30 Atl. 217.

³ *People v. Loew*, 19 N. Y. Misc. 248, 44 N. Y. Supp. 42.

⁴ This is to remedy cut-throat competition. *Equitable Life Assurance Society of the United States v. Commonwealth*, 113 Ky. 126, 67 S. W. 388.

⁵ By this method a careful estimation of the risk is assured. See *Insurance Co. v. Leslie*, 47 Oh. St. 409, 416, 24 N. E. 1072, 1074.

⁶ The Supreme Court of the United States has recently reasserted this in approving the Oklahoma Guaranty Fund Act. *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186.

⁷ *Carroll v. Greenwich Ins. Co. of New York*, 199 U. S. 401, 26 Sup. Ct. 66.

A recent federal case decided that an act providing for a general regulation of fire insurance rates,⁸ was a proper exercise of the police power. *German Alliance Ins. Co. v. Barnes*, 189 Fed. 769 (Circ. Ct., D. Kan.). But it is submitted that this power, indefinite as it is, may not be used to justify a general regulation of rates, unless it affords a suitable remedy for some recognized public evil. A previous course of legislation such as has been outlined above will not, in itself, justify a further restriction, as an exercise of the police power.⁹ If the only purpose of the enactment is to suppress a practice on the part of insurance companies of overreaching their customers in the matter of prices, this act is not a legitimate exercise of the police power, and any general language in the principal case which is susceptible of a contrary construction¹⁰ can scarcely be deemed declaratory of the law. If we except the usury laws, whose compatibility with our Constitution must be explained on historical grounds,¹¹ the preponderance of judicial opinion has opposed the extension of the police power to interference with private contracts merely to protect citizens from a hard bargain.¹² If, however, it were necessary to support the statute as an exercise of the police power, it might be supported on a ground not taken by the court, but well recognized, the protection of property.¹³ The increase of the moral hazard by unduly low, or high, premiums and its attendant danger to the underwriter affords good reason for a statute to secure safe and reasonable rates.¹⁴ But, like many other statutes regulating insurance, the Kansas act may be sustained as an exercise of the undoubted right of a state to regulate corporations of its own creation¹⁵ and to prescribe the conditions upon which foreign corporations may do business within its borders.¹⁶

It is intimated in the principal case¹⁷ that the business of insurance is affected with a public use and therefore subject to a general regulation. But the business of insurance does not constitute either a legal or virtual

⁸ KAN. SESS. LAWS, 1909, c. 152. The general provisions of the statute are that fire insurance companies shall file their rates and abide by them. If the rates are found unreasonable, the superintendent of insurance may refuse a certificate allowing them to do business until a reasonable schedule is filed.

⁹ *Wynehamer v. People*, 13 N. Y. 378.

¹⁰ For such general language, see p. 777 of the principal case.

¹¹ See FREUND, POLICE POWER, § 304; TIEDEMAN, POLICE POWER, § 94.

¹² *Adair v. United States*, 208 U. S. 161, 28 Sup. Ct. 277; *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539; *State v. Missouri Tie & Timber Co.*, 181 Mo. 536, 80 S. W. 933; *Harding v. People*, 160 Ill. 459, 43 N. E. 624. *Contra*, *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 22 Sup. Ct. 1; *Scheuermann v. Union Central Life Ins. Co.*, 165 Mo. 641, 65 S. W. 723. The United States case is based on three cases not involving the same issue. The Missouri case, unless explicable on some other ground, seems opposed in principle to the later case of *State v. Missouri Tie & Timber Co.*, *supra*. For a discussion of the authorities see an article by Professor Pound in 18 YALE L. J. 454, 482 *et seq.*

¹³ *Thorpe v. Rutland & Burlington R. Co.*, 27 Vt. 140.

¹⁴ See GRISWOLD, FIRE UNDERWRITERS' TEXT BOOK, §§ 1485-1488.

¹⁵ *McGannon v. Michigan Millers' Mutual Fire-Ins. Co.*, 127 Mich. 636, 87 N. W. 61; *Iowa Life Ins. Co. v. Eastern Mutual Life Ins. Co.*, 64 N. J. L. 340, 45 Atl. 762.

¹⁶ *Paul v. Virginia*, 8 Wall. (U. S.) 168; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281; *Head Camp Woodmen of the World v. Sloss*, 49 Colo. 177, 112 Pac. 49.

¹⁷ For *dicta* to the same effect, see *People v. Loew*, *supra*; *North American Ins. Co. v. Yates*, 214 Ill. 272, 276, 73 N. E. 423, 425; *State ex rel. v. Ackerman*, 51 Oh. St. 163, 194, 37 N. E. 828, 835.

monopoly.¹⁸ Competition is still keen, and legally it is a matter of common right.¹⁹ Moreover, the nature of the business is repugnant to such a theory, for a necessary incident of a public calling is the duty to give equal service to all.²⁰ And if the law should impose such an obligation on underwriters, they would be deprived of that *delectus personarum*, which is a necessary incident to a safe conduct of the business.²¹

VALIDITY OF FOREIGN MARRIAGES. — "A marriage good where made is good everywhere."¹ But England and America seemed to define marriage differently. England maintains that it must be a "voluntary union for life of one man and one woman to the exclusion of all others."² So long as the union has these qualities, it matters not under what system of law the marriage contract was created. The monogamous marriage of a British subject in Japan, that complies with the Japanese law, is valid in England,³ though non-Christian. The "rice" marriage of two Tamils in Ceylon is recognized, since it also involves these characteristics."⁴ On the other hand, the restitution of conjugal rights after a Mormon marriage has been refused,⁵ although in the very case the defendant had no other wife; so also with a polygamous Parsee marriage.⁶ Again, the marriage of a white man to an African Baralong has been declared not a marriage in any sense that can be recognized, for by the custom of the tribe their marriages are terminable at will.⁷

The American courts, on the other hand, have recognized such marriages. Several early cases have held American Indian tribal marriages valid, and have recognized that this status is terminable at will.⁸ This does not, however, show whether the American courts regard these marriages as inherently peculiar, or as in fact unions for life, and the right to terminate them at will as only a convenient form of divorce, sanctioned by tribal custom. But a recent case has gone so far as to say that this tribal custom operates to divorce a marriage, contracted outside the tribe. A white man, who had been adopted by the Pottawatomie Indians, married the plaintiff, a white woman, in Illinois. Later he abandoned her and returned to live among the Indians. The plaintiff is refused dower in his lands. *Cyr v. Walker*, 116 Pac. 931 (Okl.). This case can

¹⁸ See FREUND, POLICE POWER, § 377; WYMAN, PUBLIC SERVICE CORPORATIONS, §§ 29-36.

¹⁹ *Allgeyer v. Louisiana*, *supra*.

²⁰ *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 56 N. E. 822.

²¹ See GRISWOLD, FIRE UNDERWRITERS' TEXT BOOK, § 1488.

¹ See STORY, CONFLICT OF LAWS, § 113.

² See *Bethell v. Hildyard*, 38 Ch. D. 220, 234.

³ *Brinkley v. Attorney General*, 15 P. D. 76.

⁴ *Sastry Velaider Aronegary v. Sembecutty*, 6 App. Cas. 364.

⁵ *Hyde v. Hyde & Woodmanese*, L. R. 1 P. & D. 130.

⁶ *Ardasee Cursetjee v. Perozeboye*, 10 Moore P. C. 375.

⁷ *Bethell v. Hildyard*, *supra*.

⁸ *Wall v. Williamson*, 8 Ala. 48; *Johnson v. Johnson*, 30 Mo. 72; *La Riviere v. La Riviere*, 77 Mo. 512; *Kobogum v. Jackson Iron Co.*, 76 Mich. 498, 43 N. W. 602; *Earle v. Godley*, 42 Minn. 361, 44 N. W. 254. So also in Canada. *Connolly v. Woolrich*, 11 L. C. Jur. 197. *Contra*, *Roche v. Washington*, 19 Ind. 53.

only be explained on the latter of the two above theories. For if an Indian marriage were inherently peculiar only such marriages would be terminable at will, and a marriage contracted outside the tribe would not be affected. On the view in the principal case, two Indians who had migrated to a state that did not permit that form of divorce would find themselves united for life. Therefore America and England probably agree in defining marriage as a union for life.

The recognition of tribal marriage does not prevent a sovereign from forbidding certain monogamous unions for life on the ground that they are incestuous, or against its public policy, such as, for example, the intermarriage of a white and a black person. Nevertheless, both England and America recognize these marriages, if lawfully entered into by foreigners in a foreign country.⁹ But they have both hesitated when their own subjects have gone into another country thus to evade the laws of their domicile.¹⁰ They have based their refusal on the doctrine of the Civil law that the personal law of a subject follows him into whatever land he may journey. They cite Huber and other Continental jurists.¹¹ But the common law knows no such doctrine. Territoriality and not allegiance is the basis of jurisdiction. But these decisions are explicable, as in the last analysis, the sovereign of the domicile of the parties can in extreme cases refuse to superimpose the status of marriage upon a valid contract of marriage, when the nature of the union seems to it abhorrent. The parties would, then, be treated as married everywhere but in their own country.

NATURE OF CRIMINAL CONTEMPT. — A criminal contempt is an act or refusal to act which by detracting from the dignity or authority of a court tends to interfere with the administration of justice. The importance of a summary dealing with it produced a unique procedure, which was early seized upon to enforce the decrees of equity in civil suits.¹ A refusal to do justice to other parties in equity suits thus came to be known as civil contempt, although it is not inherently a contempt of court at all. Confusion has inevitably arisen, because of the similar procedure and the similar result in imprisonment or fine. Both contempts may, in fact, be found in a single act of disobedience.² It follows that the nature of the act itself cannot be a conclusive test of the character of the contempt, as the language of some English cases implies.³ Such a test can only be found in the particular purpose for which the imprisonment or fine is to be used.⁴ If punishment is sought, the contempt is criminal; if

⁹ *Re Bozzelli's Settlement*, [1902] 1 Ch. 751.

¹⁰ *Brook v. Brook*, 9 H. L. Cas. *193; *State v. Tully*, 41 Fed. 753; *Dupre v. Boulard*, 10 La. Ann. 411. Massachusetts has maintained that the domicile of the parties can make no difference. *Medway v. Needham*, 16 Mass. 157; *Commonwealth v. Lane*, 113 Mass. 458; *Sutton v. Warren*, 10 Met. (Mass.) 451. See also *Pearson v. Pearson*, 51 Cal. 120; *Steele v. Braddell*, Milw. 1.

¹¹ See *Brook v. Brook*, *supra*, *208.

¹ See 21 HARV. L. REV. 161.

² See *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 329, 24 Sup. Ct. 665, 667.

³ See *In re Freston*, 11 Q. B. D. 545; *In re Gent*, 40 Ch. D. 190.

⁴ See *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 443, 31 Sup. Ct. 492, 499.

compulsion or compensation, it is civil.⁵ In the past the form of the proceeding has shed no light on this, and to-day both purposes may sometimes be accomplished in one decree.⁶ But a recent decision of the Supreme Court of the United States,⁷ declaring that imprisonment serving no civil purpose cannot be imposed in a process civil in form, forces the prosecuting party to disclose the purpose of the proceeding at the outset. Statutes⁸ in many states have indirectly had the same effect of making the distinction easier.

It is more difficult to determine just how far common-law principles as to crimes, whose partial application to criminal contempt makes necessary the above distinction, should be applied. In England the privileges of Parliament,⁹ of attorneys,¹⁰ and of freedom from search¹¹ protect against arrest for civil contempt only. In this country the accused must have the criminal intent,¹² must be proved guilty beyond a reasonable doubt,¹³ and cannot at common law be made to testify against himself.¹⁴ Probably he may be pardoned by the executive.¹⁵ On the other hand, he has not a right to jury trial, to be confronted with witnesses, or always to be informed of the nature of the accusation.¹⁶ It seems that at common law, contempt is a crime and is dealt with by criminal principles, unless those principles interfere with the summary procedure necessary to a proper vindication of the court's authority.

A similar question arises as to the applicability to criminal contempt of statutory and constitutional provisions concerning criminal offenses in general. The privileges conferred on the accused "in all criminal prosecutions" by the Sixth Amendment do not extend to contempt.¹⁷ Yet statutes regulating appeal¹⁸ and extradition,¹⁹ and possibly the constitutional provision against self-incrimination²⁰ have precisely the opposite effect. The courts seem to take the view that, although contempt is a crime, the word "criminal" may at times be used in a narrower sense excluding contempt. Intention to employ this narrow meaning may be shown by the context or other circumstances. A recent case, which

⁵ *Gompers v. Bucks Stove & Range Co.*, *supra*; *Dodd v. Una*, 40 N. J. Eq. 672, 5 Atl. 155; *Wellesley's Case*, 2 Russ. & M. 639.

⁶ See the decree in *Matter of Christensen Engineering Co.*, 194 U. S. 458, 24 Sup. Ct. 729. Cf. *Kreplik v. Couch Patents Co.*, 190 Fed. 565.

⁷ *Gompers v. Bucks Stove & Range Co.*, *supra*.

⁸ N. Y. CONSOL. LAWS, 1909, c. 30 (N. Y. LAWS OF 1909, c. 35), § 750; WIS. STAT., 1898, § 2565.

⁹ *In re Armstrong*, [1892] 1 Q. B. 327; *Wellesley's Case*, *supra*.

¹⁰ *In re Freston*, *supra*.

¹¹ *Harvey v. Harvey*, 26 Ch. D. 644.

¹² *Telegram Newspaper Co. v. Commonwealth*, 172 Mass. 294, 52 N. E. 445.

¹³ *Oscar Barnett Foundry Co. v. Crowe*, 74 Atl. 964 (N. J.).

¹⁴ *Bates's Case*, 55 N. H. 325.

¹⁵ *Sharp v. State*, 102 Tenn. 9, 49 S. W. 752; *State v. Sauvinet*, 24 La. Ann. 119. See *In re Mullee*, 7 Blatchf. (U. S.) 23. *Contra*, *Taylor v. Goodrich*, 40 S. W. 515 (Tex.). See *In re Nevitt*, 117 Fed. 448, 456. Cf. *Matter of Special Reference*, [1893] A. C. 138.

¹⁶ *Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. 77.

¹⁷ *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900.

¹⁸ *New Orleans v. Steamship Co.*, 20 Wall. (U. S.) 387; *Hurley v. Commonwealth*, 188 Mass. 443, 74 N. E. 677; *O'Shea v. O'Shea*, 15 P. D. 59.

¹⁹ *United States v. Jacobi*, 1 Flip. (U. S.) 108, Fed. Cas. No. 15,460.

²⁰ *Ex parte Gould*, 99 Cal. 360, 33 Pac. 1112. Cf. *Boyd v. United States*, 116 U. S. 616, 634, 6 Sup. Ct. 524, 534.

holds that a prosecution for contempt is not barred by the federal Statute of Limitations for crimes, seems correct on this ground.²¹ *In re Gompers*, 39 Wash. L. R. 761 (D. C., Sup. Ct.). Also, in the absence of any clear intention, general statutory provisions for criminal offenses, like general common-law principles of the criminal law, should not be applied to contempt, if they conflict with its characteristic procedure. But otherwise contempt should be treated as other crimes, because like them it is in its nature a wrong to the state.

CONSTITUTIONALITY OF STATUTORY ADMINISTRATION ON ESTATE OF ABSENTEE IRRESPECTIVE OF DEATH. — Administration of abandoned property during the absence of the owner is generally recognized as a right and duty of the sovereign under the Civil Law,¹ and so was early introduced into Louisiana.² It has had little development in the other states, suffering undoubtedly from confusion with the ordinary common-law administration of estates.³ Since that depended upon the termination of the previous title by death,⁴ the mere finding by the probate court could not be conclusive of the fact of death, as against a living absentee, even in collateral proceedings.⁵ Statutes⁶ requiring the question to be adjudicated, or recognizing the common-law presumption arising from seven years' absence⁷ as sufficient evidence of death, failed to protect administrators and innocent third parties, for they did not purport to confer a new jurisdiction to deprive a living man of his title in favor of others.⁸ But the decision of the Supreme Court to this effect⁹ was widely and long construed as denying the power of the state, through appropriate legislation, to exercise a distinct jurisdiction over the property itself irrespective of the death of the owner, based solely upon his continued absence without tidings.¹⁰

²¹ U. S. REV. STAT., 1875, § 1044. See *Matheson v. Hanna-Schoellkopf Co.*, 122 Fed. 836. Cf. *Beattie v. People*, 33 Ill. App. 651; *Gordon v. Commonwealth*, 141 Ky. 461, 133 S. W. 206. The federal statute reads: "No person shall be prosecuted . . . unless the indictment is found, or the information is instituted within three years next after such offense shall have been committed." Contempt is usually prosecuted on affidavit, or on the court's own motion. Furthermore, contempt is not classified among the other crimes in the U. S. Revised Statutes.

¹ WRIGHT, FRENCH CIV. CODE, § 112 *et seq.*; LOEWY, GERMAN CIV. CODE, § 1911 *et seq.*

² MERRICK'S LA. REV. CIV. CODE, 1900, art. 47 *et seq.*

³ See 19 HARV. L. REV. 535; 22 *id.* 522.

⁴ *Devlin v. Commonwealth*, 101 Pa. St. 273. See *Mutual Benefit Ins. Co. v. Tisdale*, 91 U. S. 238, 243; *Melia v. Simmons*, 45 Wis. 334.

⁵ *Jochumsen v. Suffolk Savings Bank*, 3 All. (Mass.) 87. See *Griffith v. Frazier*, 8 Cranch (U. S.) 9, 23.

⁶ See *Roderigas v. East River Savings Institution*, 63 N. Y. 460; *Selden's Exr. v. Kennedy*, 104 Va. 826, 52 S. E. 635.

⁷ *Wentworth v. Wentworth*, 71 Me. 72. •

⁸ *Lavin v. Emigrant, etc. Bank*, 1 Fed. 641. See *Thomas v. People*, 107 Ill. 517, 526, 527.

⁹ *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. 1108.

¹⁰ *Carr v. Brown*, 20 R. I. 215, 38 Atl. 9; *Beck's Estate*, 15 Pa. Co. Ct. R. 564. See *Clapp v. Houg*, 12 N. D. 600, 608, 98 N. W. 710, 713; *Lavin v. Emigrant, etc. Bank*, *supra*, 675.

Finally, a second important case¹¹ on a Pennsylvania statute decided that, by providing for due process of law through a hearing, after notice by publication, the property apparently abandoned could be disposed of, so as to bind an owner absent for seven years, though still alive, at least to the extent of charging it with his obligations and the expenses of an administration similar to that of Continental countries.¹² The occasion for such an exercise of the police power lies not only in collecting and conserving the debts and other property, satisfying thereby the claims of creditors and families left without provision, and preserving the interests of presumptive next of kin from the adverse claims of intruders, but in the even more manifest public policy of protecting property rights in general from the effects of particular instances of neglect and uncertainty of title.¹³

A few state statutes have since provided for a merely temporary administration.¹⁴ Their chief purpose of giving stability to property rights would seem, however, to require some reasonable limit to the time within which the absentee can reassert his title. But the particular Pennsylvania statute¹⁵ held to be constitutional, in the case above, although providing further for the distribution of the *corpus* of the estate among the next of kin, required them to give security for its restoration, with interest, should the absentee return.¹⁶ Here again, *dicta*, interpreted to make this safeguard essential to constitutionality,¹⁷ gave like form to most of the limited amount of legislation on the subject¹⁸ and would have overthrown statutes of Indiana and Iowa which ventured to provide for a final and conclusive distribution, after the stipulated period of absence.¹⁹

But that there can constitutionally be such a conclusive distribution of an absentee's estate is established by a recent decision on a Massachusetts statute.²⁰ *Blinn v. Nelson*, 32 Sup. Ct. 1. The title of the owner is barred on the principle of ordinary statutes of limitations²¹ and his

¹¹ *Cunnius v. Reading School District*, 198 U. S. 458, 25 Sup. Ct. 721.

¹² *Cf. Attorney-General v. Provident Institution*, 201 Mass. 23, 86 N. E. 912; *Deaderick v. County Court*, 1 Cold. (Tenn.) 202. See *People v. Ryder*, 65 Hun (N. Y.) 175, 176.

¹³ See *Cunnius v. Reading School District*, 206 Pa. St. 469, 56 Atl. 16.

¹⁴ 3 COMP. LAWS, MICH., 1897, 2857; GEN. LAWS, R. I., 1909, c. 315, p. 1145. Such administration lasts until the death or survival of the owner is established.

¹⁵ PA. LAWS, 1885, 155, 1 PURDON'S DIGEST, 13 ed., 1075.

¹⁶ Under this statute, the court has dispensed with the requirement of security where the absence has continued for over twenty years before distribution. *In re Morrison's Estate*, 183 Pa. St. 155, 38 Atl. 895.

¹⁷ *Savings Bank of Baltimore v. Weeks*, 103 Md. 601, 64 Atl. 295. See *Selden's Exr. v. Kennedy*, 104 Va. 826, 829, 52 S. E. 635, 637; 19 HARV. L. REV. 535.

¹⁸ CONN. GEN. STAT., 1902, §§ 252, 319; MERRICK'S LA. REV. CODE, 1900, arts. 57, 70, 73; MD. LAWS, 1908, c. 125, p. 260; 2 N. J. GEN. STAT., 1896, 2404; VA., POLLARD, ANN. CODE, SUPP., 1910, 828; VT. PUB. STAT., 1906, §§ 2773, 2994.

¹⁹ 1 BURNS' ANN. IND. STAT., 1908, §§ 2747-2752; IA. CODE, SUPP., 1907, § 3307. The Indiana statute by its terms applies to real as well as to personal property. These statutes have been held to be constitutional by the state courts. *Barton v. Kimmerley*, 165 Ind. 609, 76 N. E. 250; *New York Life Ins. Co. v. Chittenden*, 134 Ia. 613, 112 N. W. 96.

²⁰ MASS. REV. LAWS, 1902, c. 144.

²¹ See *Nelson v. Blinn*, 197 Mass. 279, 83 N. E. 889. As to the length of the period, this statute is not an abuse of the legislative discretion. *Cf. Terry v. Anderson*, 95 U. S. 628; *Wheeler v. Jackson*, 137 U. S. 245, 11 Sup. Ct. 76.

next of kin become entitled, by the lapse of fourteen years from his disappearance, or of one year from the appointment of a temporary administrator when preceded by over thirteen years of absence. This statute, with comprehensive simplicity, provides at the same time for temporary conservation and administration, begun by a seizure of the property as well as by published notice. It has the added virtue that it applies expressly to both real and personal property.²²

VALUATION OF PROPERTY OF PUBLIC SERVICE COMPANY AS BASIS FOR DETERMINING RATES. — That courts may regulate the rates of public service companies is unquestioned.¹ From decisions holding that rates may be reduced to any extent provided some compensation is secured to the company,² the law has changed so that at present a reasonable return on the property must be left.³ What is a reasonable return is a judicial question; a court cannot establish rates at common law,⁴ but may upset existing rates.⁵

Much confusion has existed regarding the proper basis of valuation upon which a reasonable return may be earned.⁶ It is submitted that this is due to the failure to appreciate the distinction between the case of a protest against rates established by the company, and the company's attack on the rates promulgated by a legislature or commission. Rates, which allow no more than a fair profit upon the capital actually but properly and reasonably put into the business, should not be disturbed in the first class of cases;⁷ but in the latter, rates are unreasonably low only when they take property without due process of law, and the property affected is not the original investment, but the existent property used by the company.⁸ This distinction has not been taken generally, due perhaps to the fact that the mass of cases are of the latter type, which establish by the great weight of authority that the basis on which a return may be earned is the fair value of the property at the time it is

²² It is thus distinguished from most of the statutes, but the preliminary seizure of the property insures its constitutionality as a proceeding *in rem*. *Pennoyer v. Neff*, 95 U. S. 714. The statute as a whole is modelled on well-recognized legal analogies and it remedies a procedural defect whereby the inconclusiveness of mistaken adjudications of death works a hardship upon innocent parties which has caused much protest. See 14 AM. L. REV. 337; 22 CENT. L. J. 484; 10 HARV. L. REV. 62.

¹ *Munn v. Illinois*, 94 U. S. 113.

² *Chicago & N. W. Ry. Co. v. Dey*, 35 Fed. 866.

³ *Stanislaus County v. San Joaquin & King's River Canal & Irrigation Co.*, 192 U. S. 202, 24 Sup. Ct. 241.

⁴ *Osborne v. San Diego Land & Town Co.*, 178 U. S. 22, 20 Sup. Ct. 860.

⁵ *Spring Valley Water Works v. City & County of San Francisco*, 124 Fed. 574.

⁶ In *Brymer v. Butler Water Co.*, 179 Pa. St. 231, 36 Atl. 249, the proper basis was held to be the actual cost of the plant to the owners, and this decision has been followed in *Coal & Coke Ry. Co. v. Conley & Avis*, 67 W. Va. 129, 67 S. E. 613; in *San Diego Water Co. v. City of San Diego*, 118 Cal. 556, 50 Pac. 633; and in *City of Wilkes-Barre v. Spring Brook Water Supply Co.*, 4 Lack. Leg. N. (Pa.) 367. In *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, the basis is the actual value of the property. The cost of reproduction is the sole criterion in *Steenerson v. Great Northern Ry. Co.*, 69 Minn. 353, 72 N. W. 713.

⁷ BEALE & WYMAN, RAILROAD RATE REGULATION, § 339.

⁸ 2 WYMAN, PUBLIC SERVICE CORPORATIONS, § 1112.

being used for the public.⁹ A multiplicity of elements enters into such value: the actual cost of the plant, in considering which interest on the capital employed during the period of construction is a proper charge;¹⁰ the value of the stocks and bonds; money expended in permanent improvements; the probable earning capacity under the particular rates in question.¹¹ A common method is to find the cost of reproduction less depreciation.¹² To take the cost of reproduction as the present value, without deducting for depreciation is unjustifiable.¹³ It seems manifest that no allowance should be made because the cost of the present plant was enhanced by piece-meal construction, for upon reproduction this would be eliminated. A sum should be allowed for the "going-concern" value, for it is obvious that a plant fully equipped, doing business, and earning profits is more valuable than the physical elements of which it is composed. Where the establishment is being sold or condemned, all courts allow this value;¹⁴ the strong tendency is to consider it when the reasonableness of rates is in issue.¹⁵

Given the basis for a reasonable return before any question of profit is considered, all jurisdictions permit the company to earn the fixed charges of the business, and costs of maintenance and operation.¹⁶ Whether a sum may be earned annually for depreciation has produced some conflict, but the weight of authority properly allows it.¹⁷ Every plant depreciates in value, and good business policy demands a replacement fund out of the earnings.

As to profits, the courts have become united in deciding that the rate of return must depend upon the character of the investment,¹⁸ the risk,¹⁹ the return on similar enterprises in the same community,²⁰ and the prevailing²¹ and legal rate of interest.²² It is important here to distinguish between the two types of cases already referred to.²³ The percentages allowed by the courts have generally been reasonable, and rarely so meagre as to repel investment or embarrass the company in its opera-

⁹ *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192.

¹⁰ *Steenerson v. Great Northern Ry. Co.*, *supra*.

¹¹ *Smyth v. Ames*, *supra*.

¹² See *Gloucester Water Supply Co. v. City of Gloucester*, 179 Mass. 365, 382, 60 N. E. 977, 981.

¹³ *City of Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148.

¹⁴ *Brunswick & Topsham Water District v. Maine Water Co.*, 99 Me. 371, 59 Atl. 537; *Norwich Gas & Electric Co. v. City of Norwich*, 76 Conn. 565, 57 Atl. 746.

¹⁵ See *Missouri, etc. Ry. Co. v. Love*, 177 Fed. 493, 496. *Contra*, *Cedar Rapids Water Co. v. City of Cedar Rapids*, 118 Ia. 234, 91 N. W. 1081.

¹⁶ *Brymer v. Butler Water Co.*, *supra*.

¹⁷ *City of Wilkes-Barre v. Spring Brook Water Supply Co.*, *supra*; *Long Branch Commission v. Tintern Manor Water Co.*, 70 N. J. Eq. 71, 62 Atl. 474. *Contra*, *Cedar Rapids Water Co. v. City of Cedar Rapids*, *supra*.

¹⁸ *San Diego Water Co. v. City of San Diego*, *supra*.

¹⁹ *Coal & Coke Ry. Co. v. Conley & Avis*, *supra*.

²⁰ *Missouri, etc. Ry. Co. v. Love*, *supra*.

²¹ *Central of Georgia Ry. Co. v. R. Commission of Alabama*, 161 Fed. 925.

²² *Brymer v. Butler Water Co.*, *supra*.

²³ It is obvious that whether the rates established by the company are so high that they may be considered unreasonable, is a very different question from whether the rates fixed by a commission are so low as to deprive the company of its property without due process of law.

tions.²⁴ A recent case contains an unusually sound discussion of these principles. *Pioneer Tel. & Tel. Co. v. Westenhaver*, 118 Pac. 354 (Okl.).

ADMIRALTY JURISDICTION OVER TORTS. — The maritime nature¹ of the dispute was the test of jurisdiction of the ancient French admiralty court from the earliest times in the case of both contracts and torts.² The English admiralty court was coeval with the French, drew its law from the same sources,³ and like the French court exercised jurisdiction over all disputes of a maritime nature.⁴ But superimposed on this strictly maritime jurisdiction was a territorial jurisdiction over all contracts made on the seas,⁵ and all torts committed on the seas.⁶ The reason for this territorial jurisdiction, unknown to the Continental law, was, perhaps, that, as at this time the English common-law courts had no cognizance of contracts⁷ and torts⁸ without their territorial jurisdiction, it was necessary that admiralty should take care of all torts happening on the high seas and all contracts made there. But the courts of common law soon became superior to the admiralty court in England and cut down this ancient bifold jurisdiction in two ways. 1. Now having cognizance of transitory actions, they took exclusive jurisdiction of all contracts⁹ and torts¹⁰ not of a maritime nature, happening on the seas.

²⁴ As illustrations of the manner in which the courts are handling the problem, see *Cumberland Tel. & Tel. Co. v. R. Commission of Louisiana*, 156 Fed. 823; *Willcox v. Consolidated Gas Co.*, *supra*; *Long Branch v. Tintern Manor Water Co.*, *supra*.

¹ "Maritime" in this connection means "connected with a vessel." See *BENEDICT, ADMIRALTY*, 4 ed., § 182. See also note 20, *infra*. The French view of "maritime nature" is more liberal. See the citations in note 2, *infra*.

² See French Maritime Ordinances of 1400, 1517, and 1681, which may be found in *CLEIRAC, US ET COUTUMES DE LA MER*, ed. 1788, 191; 1 *VALIN, ORDONNANCE DE LA MARINE*, ed. 1766, 124, 112, 120, 138, 140, 143; *BENEDICT, ADMIRALTY*, 4 ed., § 106.

³ The immediate source of both was the Laws of Oléron. See 1 *TWISS, BLACK BOOK OF THE ADMIRALTY*, ed. 1871, ix, 88. See also *CLEIRAC, US ET COUTUMES DE LA MER*, 277, § xix.

⁴ The Black Book shows that Admiralty had jurisdiction over certain maritime contracts. See 1 *TWISS, BLACK BOOK OF THE ADMIRALTY*, 68, 69, § 20. Also over all matters pertaining to admiralty by ancient law. *Ibid.* 83, § 35. This, it is submitted, included all torts of a maritime nature, though no summary of tort jurisdiction is contained in the Black Book. It is true that no instance of the assumption of jurisdiction over a maritime tort on land occurs in the Black Book; but it is submitted that this does not necessitate the conclusion that torts of this kind were not included, for the instances of torts in the Black Book are not numerous, and it may well be that the case of a vessel injuring a pier, which is about the only tort of a maritime nature that can occur on land, did not then arise. But see *Story, J.*, in *Thomas v. Lane*, 2 Sumn. (U. S.) 1, 9, Fed. Cas. No. 13,902, p. 960.

⁵ 1 *TWISS, BLACK BOOK OF THE ADMIRALTY*, 69, § 21.

⁶ See *Story, J.*, in *De Lovio v. Boit*, 2 Gall. (U. S.) 398, 406, Fed. Cas. No. 3,776, p. 421. See also 1 *TWISS, BLACK BOOK OF THE ADMIRALTY*, 45, § 4, 47, § 5, 55, § 14, 109.

⁷ See *Ward's Case*, Latch 4.

⁸ See *Davis v. Yale*, 2 Lutw. 946.

⁹ Justice Story describes the process by which this was done in *De Lovio v. Boit*, 2 Gall. (U. S.) 398, 407-406, Fed. Cas. No. 3,776, pp. 421-441. The resultant limitation of contract jurisdiction is described in 2 *BROWNE, CIVIL LAW AND ADMIRALTY LAW*, 2 ed., 1802, 72, 94.

¹⁰ The adjudications depriving admiralty of jurisdiction over non-maritime torts

In so doing they deprived the maritime court of a jurisdiction which had been peculiar to English admiralty law and which had no longer a reason for existence. 2. They took exclusive jurisdiction, also, of all contracts made on land¹¹ and all torts occurring on land,¹² and thus cut into the most ancient jurisdiction of admiralty, excising many disputes of a maritime nature. But English statutes have since restored to admiralty, jurisdiction over contracts and torts of a maritime nature, made or occurring on land,¹³ and have thus assimilated English admiralty law to the ancient Continental law.

As to contracts, the United States admiralty law has, like the ancient Continental law, taken the nature of the subject matter as the sole test of jurisdiction.¹⁴ It is to be noted that this is not adopting the jurisdiction of the ancient English admiralty court, for miscellaneous contracts made on the sea were included in that jurisdiction¹⁵ and are not in United States admiralty jurisdiction.¹⁶ As to torts, it is settled in the United States that no tort not occurring on the water is within admiralty cognizance.¹⁷ Thus a limitation on the ancient Continental admiralty jurisdiction, once possessed by the English admiralty court¹⁸ has been adopted.

Whether torts on the water which are not of a maritime nature are within our admiralty cognizance is still an open question. A recent decision, and the trend of legal opinion in this country, is that they are. *Imbrovek v. Hamburg-American Steam Packet Co.*, 190 Fed. 229 (Dist. Ct., D. Md.). But there is a decision in the Circuit Court of Appeals of the Ninth Circuit *contra*.¹⁹ If the District Court decision prevails, our admiralty courts will assume a jurisdiction which, though justifiably enough exercised by the English admiralty court before transitory actions were cognizable at common law, is without basis in the ancient Continental admiralty law, is contrary to the modern English law, and has in fact little reason for existence except that it makes the test of tort jurisdiction comparatively simple.²⁰ If the contrary decision should prevail, our law

occurring on the seas are comparatively recent. *The Queen v. City of London Court Judge*, [1892] 1 Q. B. 273. Cf. *Everard v. Kendall*, L. R. 5 C. P. 428.

¹¹ See note 9.

¹² Jurisdiction of maritime torts ashore was early prohibited, perhaps before it was ever exercised. Justice Story believed that it never existed. See *Thomas v. Lane*, 2 Sumn. (U. S.), 1, 9, Fed. Cas. No. 13,902, p. 960.

¹³ ADMIRALTY COURT ACT, 1861, (24 & 25 VICT. c. 3), §§ 4-11.

¹⁴ *Ins. Co. v. Dunham*, 11 Wall. (U. S.) 1.

¹⁵ See note 5.

¹⁶ There is no express adjudication to this effect but it is nevertheless well recognized law drawn from the *dictum* in *Ins. Co. v. Dunham*, *supra*, 29. See HUGHES, ADMIRALTY, 17.

¹⁷ *The Plymouth*, 3 Wall. (U. S.) 20; *Cleveland, etc. R. Co. v. Cleveland Steamship Co.*, 208 U. S. 316, 28 Sup. Ct. 414.

¹⁸ If, as Justice Story believed, the ancient English admiralty court did not once possess a potential jurisdiction over maritime torts consummated on land, these cases (in note 17) are explainable on the ground that the United States admiralty courts cannot exercise a larger jurisdiction than that of the ancient English admiralty. If this be so, an authoritative decision that torts on the water not of a maritime nature are not within our admiralty jurisdiction would make our tort and contract jurisdictions consistent, in that each would then be that part of the ancient English jurisdiction which was also within the ancient Continental jurisdiction.

¹⁹ *Campbell v. Hackfeld & Co.*, 125 Fed. 696.

²⁰ The argument of simplicity is set forth in 16 HARV. L. REV. 210. That there is some difficulty in applying the test of maritime nature is shown by the conflict between

as to tort jurisdiction would, like that as to contracts, follow the ancient Continental test of the nature of the act, except in the single instance of injuries to things on shore by ships. This exception could then be removed by statute as was done in England.²¹

RECENT CASES.

ADMIRALTY — JURISDICTION: TORTS — MARITIME NATURE. — A contracting stevedore's employee was injured on a vessel by the negligence of the stevedore in failing to supply a safe place to work. *Held*, that this tort is within admiralty jurisdiction. *Imbrovek v. Hamburg-American Steam Packet Co.*, 190 Fed. 229 (Dist. Ct., D. Md.) See NOTES, p. 381.

BANKRUPTCY — RIGHTS AND DUTIES OF BANKRUPT — PERJURY IN EXAMINATION. — The Bankruptcy Act, § 7a (9), provides that "the bankrupt shall . . . submit to an examination . . . ; but no testimony given by him shall be offered in evidence against him in any criminal proceeding." *Held*, that this provision does not bar a prosecution of the bankrupt for perjury committed in his examination. *Glickstein v. United States* (U. S. Sup. Ct., Dec. 4, 1911).

This case settles the law upon a clause as to which there had been a conflict in the authorities. Some cases had held that it applied to perjury, as the language covered all criminal proceedings, and to supply a reservation in the case of perjury similar to that in other federal statutes compelling testimony would amount to judicial legislation. U. S. REV. STAT., 1878, § 860; 27 U. S. STAT. AT LARGE, p. 443, c. 83; *United States v. Simon*, 146 Fed. 89. See *In re Logan*, 102 Fed. 876. Others had decided that it did not apply, since that construction would, by removing the penalty for perjury, defeat the obvious intent of Congress to secure truthful testimony. *Edelstein v. United States*, 149 Fed. 636; *Wechsler v. United States*, 158 Fed. 579. The principal case has wisely adopted this latter view. See 20 HARV. L. REV. 571.

BILLS AND NOTES — DEFENSES — MISREPRESENTATION. — The making of a promissory note was induced by misrepresentations of the payee's agent, which were not intentionally false. *Held*, that the maker has a defense against the payee. *McNeill v. Bay Springs Bank*, 56 So. 333 (Miss.).

It is generally held that a contract induced by innocent misrepresentations may be rescinded in equity. *Redgrave v. Hurd*, 20 Ch. D. 1; *Wilcox v. Iowa Wesleyan University*, 32 Ia. 367. But see *Southern Development Co. v. Silva*, 125 U. S. 247. By the weight of authority this does not constitute a defense at law. *Kennedy v. Panama, etc. Mail Co.*, L. R. 2 Q. B. 580; *King v. Eagle Mills*, 10 All. (Mass.) 548. *Contra*, *Kirschbaum v. Jasspon*, 123 Mich. 314, 82 N. W. 69. A distinction should be made between the cases where the misrepresentations are relied on to found an action of tort for damages, and where as in the principal case they are used to avoid a contract. In the former cases it is sought to impose a liability for making innocent misrepresentations. In the latter, it is sought to prevent the person making these misrepresentations from reaping any benefit from them. In the latter cases, on principle, relief should be allowed

the principal case and the Ninth Circuit case as to whether the tort of a contracting stevedore is maritime. But the paramount advantages of this test are shown in 18 HARV. L. REV. 299.

²¹ ADMIRALTY COURT ACT, 1861, (24 & 25 VICT. c. 3), § 7.

either in equity or at law on the ground that it is not fair that a person should profit from his own misrepresentations. The doctrine of the principal case would seem to be a desirable one.

CONFLICT OF LAWS — JURISDICTION FOR DIVORCE — INDIAN DIVORCE. — A white man married and then abandoned his white wife, the plaintiff, in Illinois. He went to live among the Pottawatomie Tribe of Indians in Indian Territory, by whom he had formerly been adopted. He acquired land there and died. By the tribal law the marriage status of members of the tribe might be terminated at will and abandonment operated as a divorce. The plaintiff, claiming as his widow, sought an interest in his real estate. *Held*, that the Indian divorce is valid. *Cyr v. Walker*, 116 Pac. 931 (Okl.). See NOTES, p. 374.

CONFLICT OF LAWS — RECOGNITION OF FOREIGN JUDGMENTS — EFFECT OF REVERSAL OF JUDGMENT GIVEN EFFECT IN ANOTHER STATE. — A. and B. claimed the right of custody of a child. A decree of an Illinois court awarded the custody to A. Subsequently in *habeas corpus* proceedings brought by B. in Kansas, the court held that the Illinois decree was controlling. Afterwards, the appellate court in Illinois reversed the judgment of the lower court. *Held*, that the judgment of the Illinois appellate court is not admissible, in a prosecution in Kansas for kidnapping, to prove that A. did not have lawful custody of the child. *State v. Tillotson*, 117 Pac. 1030 (Kan.).

The pendency of an appeal from a final judgment does not prevent that judgment from being successfully pleaded as *res judicata*. *Parkhurst v. Berdell*, 110 N. Y. 386, 18 N. E. 123. Does the subsequent reversal of the judgment on appeal affect the rights of the parties? That depends, it is submitted, on the basis of the rights claimed. If, in the principal case, the Kansas court merely dismissed the proceedings before it, the basis of A.'s right was the Illinois decree, and the reversal took away that right. But if, as it was held, the Kansas court made an affirmative decree, the decree established a new right. Subsequent reversal of the Illinois decree could affect this right only as a later determination of the right to custody. The Illinois court was one of competent jurisdiction and its decree entitled to full faith and credit. *Bleakley v. Barclay*, 75 Kan. 462, 89 Pac. 906. However, as the judgment of reversal only purported to declare the right to custody at the time when the suit began, it did not involve a later determination of that right; consequently it was rightly held inadmissible. It might, however, have been ground on which to base a new suit. *Cf. White v. Atchison, etc. Ry. Co.*, 74 Kan. 778, 88 Pac. 54.

CONFLICT OF LAWS — RECOGNITION OF FOREIGN PENAL LAWS — SUIT TO COLLECT A FOREIGN TAX. — The state of Maryland and the city of Baltimore sued the defendant in New York for the amount of taxes assessed against his personality while he was a resident of Baltimore. Maryland courts consider that a tax raises a contractual liability while New York courts do not. *Held*, that the plaintiffs cannot recover. *State of Maryland v. Turner*, 46 N. Y. L. J. 935 (N. Y., Sup. Ct.).

It is an elementary principle that one country will not enforce the penal laws of another country. See 1 WHARTON, CONFLICT OF LAWS, 3 ed., §§ 4, 4 b. This principle probably applies with equal force to revenue laws. See *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 290, 8 Sup. Ct. 1370, 1374. At all events a special assessment for improvements on real property is in the nature of a penalty and is not recoverable abroad. *Municipal Council of Sydney v. Bull*, [1909] 1 K. B. 7. Whether the law which is presented for enforcement is penal or not is a question for the consideration of the court whose aid is invoked. *Huntington v. Attrill*, [1893] A. C. 150. Even if the obligation has been reduced

to a judgment in its home forum, the foreign court must decide for itself what is the true nature of the liability. See *Huntington v. Attrill*, 146 U. S. 657, 683-684, 13 Sup. Ct. 224, 234. *A fortiori*, then, in the principal case the court was clearly right in abiding by its own view of the nature of a tax. Any other decision would put the state in the peculiar position of collecting taxes for such states as regard the obligation as contractual, and refusing to collect the same sort of tax for other states that regard it as penal. See *Huntington v. Attrill*, [1893] A. C. 150, 155.

CONFLICT OF LAWS — REMEDIES: RIGHT OF ACTION — FOREIGN CONTRACT CONTRARY TO PUBLIC POLICY OF FORUM. — Jewelry delivered to an express company for carriage from New York to Virginia was lost *en route*. The contract of shipment, limiting the company's liability to fifty dollars, was valid in New York, where it was made, but was invalid by statute in Virginia, where suit was brought. *Held*, that the plaintiff may recover the full value of the goods lost. *Adams Express Co. v. Green*, 72 S. E. 102 (Va.).

The best rule is that the law of the place of contracting should govern the validity of a contract. See 23 HARV. L. REV. 260, 270-272. But in the last analysis a sovereign state, subject in this country to the federal and state constitutions, may deny relief or enforce liability in its courts as it pleases. Since, however, most sovereign states are interested in the administration of justice, a valid contract will usually be enforced. *Forepaugh v. Delaware, etc. R. Co.*, 128 Pa. St. 217, 18 Atl. 503; *Greenwood v. Curtis*, 6 Mass. 358. Yet if the court believes that justice will result from not enforcing the contract, there is nothing to prevent a denial of relief. See 1 WHARTON, CONFLICT OF LAWS, 3 ed., § 4a. So in the principal case the contract was not enforced because it was said to be against the public policy of the state. *The Kensington*, 183 U. S. 263, 22 Sup. Ct. 102; *Chicago, B. & Q. R. Co. v. Gardiner*, 51 Neb. 70, 70 N. W. 508. Public policy differs in the various jurisdictions, and the canons for determining public policy are so indefinite, that it is not surprising that there are cases *contra*. *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553, 27 N. E. 665; *Talbot v. Merchant's Despatch Transportation Co.*, 41 Ia. 247. Criticism of such cases would only involve us in questions of fact or economic principles. See 2 WHARTON, CONFLICT OF LAWS, 3 ed., § 471 c.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — ADMINISTRATION OF ESTATE OF ABSENTEE IRRESPECTIVE OF DEATH. — A Massachusetts statute provided that wherever a resident disappeared without leaving any known agent, the court might order the seizure of his property and after due notice appoint a receiver. If the absentee did not appear within fourteen years after his disappearance, or one year after the appointment of a receiver, if a receiver was not appointed within thirteen years after the date of his disappearance, his title was barred and his next of kin were entitled to distribution. *Held*, that the statute is constitutional. *Blinn v. Nelson*, 32 Sup. Ct. 1. See NOTES, p. 377.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — REGULATION OF FIRE INSURANCE RATES. — A Kansas statute provided for a regulation of the rates of fire insurance companies. *Held*, that the statute is constitutional. *German Alliance Ins. Co. v. Barnes*, 189 Fed. 769 (Circ. Ct., D. Kan.). See NOTES, p. 372.

CONTEMPT — POWER TO PUNISH FOR CONTEMPT — NATURE OF CRIMINAL CONTEMPT. — The respondent was charged with contempt of court for disobeying an injunction. He moved to dismiss the charges, because the offense had been committed more than three years before the charges were filed.

Held, that the criminal Statute of Limitations does not apply to contempt of court. *In re Gompers*, 39 Wash. L. R. 761 (D. C., Sup. Ct.). See NOTES, p. 375.

CONTRACTS — CONTRACTS UNDER SEAL — SUIT BY ONE NOT A PARTY TO CONTRACT. — The defendant agreed with the plaintiff's mother by a contract under seal to support her for life. On the defendant's failure to keep his agreement, the plaintiff was compelled to support his mother. *Held*, that the plaintiff cannot recover from the defendant on the contract. *Case v. Case*, 203 N. Y. 263, 96 N. E. 440.

The strict regard which the law has held for the form of instruments under seal has usually permitted only the parties themselves to such an instrument to enforce it. *Storer v. Gordon*, 3 M. & S. 308; *Chesterfield, etc. Colliery Co. v. Hawkins*, 3 H. & C. 677. A principal cannot enforce a contract under seal made for him by an agent unless clearly made in the principal's name. *Townsend v. Hubbard*, 4 Hill (N. Y.) 351. Cf. *Borcherling v. Katz*, 37 N. J. Eq. 150. In jurisdictions where importance is still attached to a seal, the beneficiary of a contract under seal made for the benefit of a third party cannot sue upon it. *Inhabitants of Farmington v. Hobert*, 74 Me. 416; *Cocks v. Varney*, 45 N. J. Eq. 72, 17 Atl. 108. Many jurisdictions, however, have been more liberal and have allowed the beneficiary of a contract under seal to sue thereon. *Coster v. Mayor, etc. of Albany*, 43 N. Y. 399; *Rogers v. Gosnell*, 51 Mo. 466. This is usually the case where the promisor's covenant is to assume a mortgage. *North Alabama Development Co. v. Orman*, 55 Fed. 18; *Central Trust Co. v. Berwind-White Coal Co.*, 95 Fed. 391. The plaintiff in the principal case should not be allowed to recover as a beneficiary, since apparently it was intended that he should only be incidentally benefited. *Durnherr v. Rau*, 135 N. Y. 219, 32 N. E. 49; *N. O. St. Joseph's Association v. Magnier*, 16 La. Ann. 338. But, it is submitted, the plaintiff had a quasi-contractual right of action for having discharged an obligation owed primarily by the defendant. *Rundell v. Bentley*, 53 Hun (N. Y.) 272, 6 N. Y. Supp. 609. See 24 HARV. L. REV. 583.

CONTRACTS — DEFENSES — INABILITY OF PLAINTIFF TO PERFORM — REPUDIATION ON INSUFFICIENT GROUND AS WAIVER OF GOOD EXCUSE. — A seller attempted to take advantage of the provision of an instalment contract giving the right of rescission in case of late payment. In a suit by the buyer, the jury found that this right was waived by repeatedly accepting overdue payments. *Held*, that the seller may not introduce evidence of the buyer's insolvency as a further excuse. *Honesdale Ice Co. v. Lake Lodore Improvement Co.*, 81 Atl. 306 (Pa.).

One defense should not be waived by advancing another consistent one. See WILLISTON, SALES, § 495. Thus, a servant's dismissal is justifiable if a valid excuse existed though at the time the master alleged groundless reasons. *Green v. Edgar*, 21 Hun (N. Y.) 414; *Boston Deep Sea Fishing and Ice Co. v. Ansell*, 39 Ch. D. 339. For the servant cannot show good service or excuse for not serving well. See 19 HARV. L. REV. 63. But a lien is lost if an invalid ground is advanced for non-delivery of the goods. *Boardman v. Sill*, 1 Camp. 410, note; *Witt v. Dersham*, 146 Mich. 68, 109 N. W. 25. And there can be no objection to a deed as insufficient or an offer to pay as not in legal tender, if refusal is based upon other reasons. *Keller v. Fisher*, 7 Ind. 718; *Beatty v. Miller*, 94 N. E. 897 (Ind.). If repudiation on an invalid ground justifies the assumption that the tender will be refused though an existing breach be healed, repudiation excuses non-completion. *Lathrop v. O'Brien*, 57 Minn. 175, 58 N. W. 987; *Braithwaite v. Foreign Hardwood Co.*, [1905] 2 K. B. 543. Cf. *Clegg v. Southern Ry. Co.*, 135 N. C. 148, 47 S. E. 667. But if the breach is incurable, repudiation cannot be the cause of the plaintiff's non-performance,

and he has no excuse. Insolvency justifies refusal of credit and an assumption that the contract will not be carried out. *Ex parte Chalmers*, L. R. 8 Ch. 289. Consequently, the evidence in the principal case should be admitted unless the plaintiff shows he would have given notification of his intention and ability to buy for cash, but was misled because the defendant did not base his rescission on insolvency.

CONTRIBUTORY NEGLIGENCE — DIVISION OF DAMAGES BETWEEN NEGLIGENT VESSELS. — An action was brought in a state court for damages caused to the plaintiff's vessel by a collision with the defendant's vessel, due to the negligence of both. *Held*, that the plaintiff may recover one-half of the loss suffered. *St. Louis & Tennessee River Packet Co. v. Murray*, 139 S. W. 1078 (Ky.).

Heretofore, if a plaintiff has brought his action in a state court for negligent injury to a vessel by collision, the common-law rule has been applied that if he is negligent he cannot recover. *New York Harbor Towboat Co. v. New York, etc. Ry. Co.*, 148 N. Y. 574, 42 N. E. 1086. See *Union Steamship Co. v. Nottinghams*, 17 Grat. (Va.) 115, 123. An early Louisiana case stated that if both vessels were at fault the loss should be divided. *Brickell v. Frisby*, 2 Rob. (La.) 204. Later cases in that state refuse to apply this rule. *Murphy v. Diamond*, 3 La. Ann. 441. Except for the Louisiana case, the principal case is the only instance of an action in a state court where the admiralty rule of damages has been applied. It directly overrules an earlier Kentucky decision. *Broadwell v. Swigert*, 7 B. Mon. (Ky.) 39.

CRIMINAL LAW — APPEAL — PRESUMPTION AS TO HARMLESS ERROR. — At the trial of the defendant for perjury a question was submitted to the jury which the court should have decided. The defendant was convicted. *Held*, that to secure a reversal the defendant must show that the error was prejudicial to him. *Coleman v. State*, 118 Pac. 594 (Okl.).

Several jurisdictions have the rule that if the error might have prejudiced the rights of the defendant, there must be a reversal. *Boyd v. State*, 16 Lea (Tenn.) 149. See *Boren v. State*, 32 Tex. Cr. R. 637, 645, 25 S. W. 775, 776. Others hold that if there was error it is presumed prejudicial to the defendant, and unless this presumption is rebutted, a reversal must follow. *Barnett v. Commonwealth*, 84 Ky. 449, 1 S. W. 722; *State v. Johnson*, 69 Ia. 623, 29 N. W. 754. The principal case holds that a defendant must show the appellate court that the error prejudiced his rights in order to secure a reversal. This rule is the best, and has the support of advanced thinkers on criminal procedure. See 35 REPORTS OF AMERICAN BAR ASSOCIATION, 624 *et seq.* A recent amendment to the Constitution of California, proposed by the legislature, provides that there shall be no reversal in a criminal case unless the court believes the error has resulted in a miscarriage of justice. CAL. STAT. OF 1911, 1798, c. 36.

CRIMINAL LAW — INSANITY — BURDEN OF PROOF. — In a trial for murder the defendant introduced evidence of insanity. *Held*, that the burden is upon the prosecution to prove sanity beyond a reasonable doubt. *Adair v. State*, 118 Pac. 416 (Okl.).

The principal case is correct in holding that insanity is a question of responsibility, and not an affirmative defense, the presumption of sanity placing the burden of going forward upon the defendant but not relieving the prosecution of its duty of proving all essential elements of the offense. For the authorities and principles involved, see 4 HARV. L. REV. 45, 55; 11 *id.* 62; 13 *id.* 59; 18 *id.* 312.

DAMAGES — CONSEQUENTIAL DAMAGES — RECOVERY FOR MENTAL ANGUISH CAUSED BY BREACH OF CONTRACT. — The plaintiff bought a ticket for

admission to the defendant's public seashore bathhouse. A dispute arose between the plaintiff and one of the defendant's servants, as a result of which the plaintiff was ejected from the premises. The plaintiff brought an action for breach of contract. *Held*, that the plaintiff may recover damages for the indignity as well as the price of the ticket. *Aaron v. Ward*, 46 N. Y. L. J. 963 (N. Y., Ct. App., Nov. 21, 1911).

Proprietors of bathhouses, as of other places of public resort, may be forbidden by statute to refuse admittance to any citizen properly applying. *Cf. Greeneberg v. Western Turf Association*, 140 Cal. 357, 73 Pac. 1050; *People v. King*, 110 N. Y. 418, 18 N. E. 245. But aside from statutory regulations the proprietor may serve whom he pleases. *People ex rel. Burnham v. Flynn*, 189 N. Y. 180, 82 N. E. 169. Though by selling a ticket the proprietor contracts to give the purchaser a license to enter his premises, he has the power to break the contract and revoke the license. *Wood v. Leadbitter*, 13 M. & W. 838; *Horney v. Nixon*, 213 Pa. St. 20, 61 Atl. 1088. Thereafter the ticket-holder enters or continues on the premises as a trespasser, and cannot maintain an action for assault if he is ejected with reasonable force. *McCrea v. Marsh*, 12 Gray (Mass.) 211; *Burton v. Scherpf*, 83 Mass. 133. But an action for breach of contract lies. *Taylor v. Cohn*, 47 Or. 538, 84 Pac. 388. Compensatory damages for breach of contract will not usually include a recovery for mental distress. *Hamlin v. Great Northern Ry. Co.*, 1 H. & N. 408; *Connell v. Western Union Tel. Co.*, 116 Mo. 34, 22 S. W. 345. But when from the nature of the contract it can be foreseen that great mental anguish will result from the breach, for which a recovery of the consideration paid is utterly inadequate compensation, such suffering should be considered in estimating damages. *Renihan v. Wright*, 125 Ind. 536, 25 N. E. 822. On the same theory the principal decision is to be commended. *Smith v. Leo*, 92 Hun (N. Y.) 242, 36 N. Y. Supp. 949. *Contra, Buensle v. Newport Amusement Association*, 29 R. I. 23, 68 Atl. 121. See 21 HARV. L. REV. 541.

EMINENT DOMAIN — COMPENSATION — COSTS. — A statute provided that "costs shall not be taxed to any party" by the court of claims. Condemnation proceedings were brought in this court. Another statute provided that "costs, where not specially regulated, may be awarded." *Held*, that costs may be allowed the owner of the property. *Brainerd v. State*, 131 N. Y. Supp. 221 (Ct. of Claims).

With rare exceptions the decisions have avoided holding that the constitutional requirement of "compensation" to the owner of property taken under eminent domain assures to him the allowance of costs in condemnation proceedings. In some, the constitutional provision merely fortifies an otherwise reasonable construction of a statute for the allowance of such costs. *City and County of San Francisco v. Collins*, 98 Cal. 259, 33 Pac. 56. In others, it has induced courts, in order to achieve a similar result, to give statutes a strained construction. *Stolze v. Milwaukee, etc. R. Co.*, 113 Wis. 44, 88 N. W. 919. A statutory repetition of the constitutional provision has been held to provide for the allowance of costs. *Land and Canal Co. v. Hartman*, 17 Colo. 138, 29 Pac. 378. But the great weight of authority refuses to allow costs in the absence of statute. *Gifford v. Dartmouth*, 129 Mass. 135; *Matter of Board of Rapid Transit Railroad Commissioners*, 197 N. Y. 81, 90 N. E. 456. *Contra, Petersburg School District v. Peterson*, 14 N. D. 344, 103 N. W. 756. Costs of an appeal unsuccessfully taken by the owner can even be taxed against him. *Matter of Village of Theresa*, 121 N. Y. App. Div. 119, 105 N. Y. Supp. 568; *Kitsap County v. Melker*, 52 Wash. 49, 100 Pac. 150. But it is unconstitutional to tax against the owner the costs of an appeal successfully brought by the condemning party. *Matter of New York, etc. Ry. Co.*, 94 N. Y. 287; *Grays Harbor Boom Co. v. Lowsdale*, 54 Wash. 83, 104 Pac. 267. *Contra, Meller v. Easton*

and *Amboy R. Co.*, 37 N. J. L. 222. It has been held, though this is opposed to the weight of authority, that even the costs of the original proceeding are taxable against the owner. *Rogers v. City of St. Charles*, 54 Mo. 229. *Contra*, *Adams County v. Dobschlag*, 19 Wash. 356, 53 Pac. 339.

EMINENT DOMAIN — COMPENSATION — WATERWAY CONSTRUCTED BY CITY THROUGH RAILWAY'S RIGHT OF WAY NECESSITATING STRUCTURAL CHANGES. — A city constructed a canal, with walks on either side, through the right of way of a railroad, in order to join certain lakes, used principally for pleasure by its inhabitants. This made it necessary for the railroad to build a bridge. *Held*, that the railroad is not entitled to recover from the city the cost of building the bridge. *Chicago, M. & St. P. Ry. Co. v. City of Minneapolis*, 133 N. W. 169 (Minn.).

The authorities are not harmonious in allowing compensation in such cases. This is because judges have not always been mindful of the distinction between eminent domain and the police power. See 3 HARV. L. REV. 189; 22 *id.* 542. The former is resorted to where private property is taken for a public use; the latter where the sovereign restricts, regulates, or destroys private property in the public interest. See 1 LEWIS, EMINENT DOMAIN, §§ 3, 6, 7. In the latter case there need be no compensation. *Philadelphia v. Scott*, 81 Pa. St. 80. In certain border-line cases the two powers so shade into each other that it becomes difficult to say whether there is a duty to make compensation. See *Philadelphia v. Scott*, *supra*, 86. However, in the principal case the erection of the bridge was made necessary by the exercise of the right of eminent domain. It is damage proximately consequent. The police power was not properly invoked. Where no special statutory provisions exist, as in the principal case, the rule is to give the value of the land taken and the cost of structural changes made necessary. *Paterson, etc. R. Co. v. Nulley*, 72 N. J. L. 123, 59 Atl. 1032; *Cincinnati, etc. Ry. Co. v. Troy*, 68 Oh. St. 510, 67 N. E. 1051. See 2 LEWIS, EMINENT DOMAIN, § 733. But *cf.* *C. & W. Ry. Co. v. City of Connersville*, 218 U. S. 336, 31 Sup. Ct. 93. But there is considerable diversity among the statutory provisions on the subject. See 2 LEWIS, EMINENT DOMAIN, §§ 733 *et seq.*

EMINENT DOMAIN — COMPENSATION — WHAT CONSTITUTES AN ENTIRE TRACT. — The plaintiff owned a block of land on B. Street south of A. Street, and also the fee of B. Street, subject to a public easement. The defendant railway company, owning land on both sides of B. Street north of A. Street, built a bridge for trains, with the consent of the city authorities, across A. Street from one portion of its land to the other. *Held*, that the plaintiff can recover merely nominal damages for the injury done to his fee of the street and not consequential damages for the injury to his lot. *Coatsworth v. Lehigh Valley Ry. Co.*, 131 N. Y. Supp. 300 (Sup. Ct.).

It is well established that where part of a parcel of land is taken under eminent domain, just compensation includes damages to the residue as well as the value of the portion taken. *South Buffalo Ry. Co. v. Kirkover*, 176 N. Y. 301, 68 N. E. 366; *Richardson v. City of Centerville*, 137 Ia. 353, 114 N. W. 1071. What constitutes a "parcel" in this sense has been the subject of much litigation. See 2 LEWIS, EMINENT DOMAIN, 3 ed., §§ 698-701. If the residue was more valuable in connection with the land taken than it is as a separate lot, justice clearly requires that the owner be compensated for the decrease in value. That being the reason of the rule, in order to fall within it, the two lots, it is generally held, must be used as one property or be adapted to such use. *Hoyt v. Chicago, etc. Ry. Co.*, 117 Ia. 296, 90 N. W. 724; *Frick Coke Co. v. Painter*, 198 Pa. St. 468, 48 Atl. 302. Thus, if a man having two contiguous farms occupies one and rents the other, he cannot collect for damages to both, if a

portion of one is taken. *Minnesota Valley R. Co. v. Doran*, 15 Minn. 230. In the present case, the test is not satisfied, since the plaintiff's right in the street is merely nominal, the public being virtually the owner. See *City of Schenectady v. Trustees of Union College*, 144 N. Y. 241, 249, 39 N. E. 67, 68. The decision, therefore, is clearly correct.

EQUITY — JURISDICTION — SECURITY FROM ADMINISTRATOR FOR PAYMENT OF UNMATURED DEBT OF DECEDENT. — The plaintiff's claim against the estate of the maker of notes, maturing more than three years after the maker's death, was disputed by his administrator. The only remedy provided by the Code was suit at law after the notes matured. The administrator demurred to the plaintiff's petition in equity to have sufficient assets set aside to meet the claim when due. *Held*, that the demurrer should be overruled. *Bankers' Surety Co. v. Meyer*, 131 N. Y. Supp. 57 (App. Div.).

Creditors' bills against an administrator constitute one of the oldest heads of equity jurisdiction. See POMEROY, *EQUITY JURISPRUDENCE*, 3 ed., §§ 348 *et seq.*, §§ 1151 *et seq.* To-day administration proceedings are carried on almost exclusively in the probate court. Statutes usually provide that a fund may be ordered to be set apart to meet unmatured or contingent claims. *Hoyt v. Bonnett*, 50 N. Y. 538. See *Cobb v. Kempton*, 154 Mass. 266, 268, 28 N. E. 264, 265. But generally equity still has at least supplementary jurisdiction. See *Chipman v. Montgomery*, 63 N. Y. 221, 235, 236. The principal case proceeds on the ground of a trust. But, though the executor holds the assets in a fiduciary relation to creditors and legatees, he is to be distinguished from a trustee. See AMES, *CASES ON TRUSTS*, 2 ed., 73, note 4. In a suit against an executor for a debt, the period of limitation is not that for enforcing trusts. *Scott v. Jones*, 4 Cl. & Fin. 382. A legacy is not a trust under a statute excepting trusts from the operation of a creditor's bill. *Bacon v. Bonham*, 27 N. J. Eq. 209. The creditor, however, should be able to secure the payment of his unmatured claim. *Johnson v. Mills*, 1 Ves. Sen. 282. See *Petrie v. Voorhees' Exr.*, 18 N. J. Eq. 285, 288. One whose legacy is payable in the future has a similar right. *Merritt v. Richardson*, 14 All. (Mass.) 239, 242. Likewise, a life-tenant of personalty may be required to give security for the protection of the remainderman. *Lyde v. Taylor*, 17 Ala. 270.

INSURANCE — NATURE AND INCIDENTS OF INSURANCE CONTRACTS — CONTRACT TO DEFEND PHYSICIAN AGAINST SUITS FOR MALPRACTICE. — The plaintiff company brought a bill to restrain the insurance commissioner from interfering with its business, which consisted in issuing a contract to physicians, whereby the company in consideration of an annual payment agreed to employ an attorney to defend the holder of the contract in all suits for civil malpractice that should be brought against him; but the company was not to pay the judgment if the suit were lost. *Held*, that the bill should be dismissed. *Physicians' Defense Co. v. Cooper*, 188 Fed. 832 (Circ. Ct., N. D. Cal.).

"Insurance is a contract by which the one party in consideration of a price paid adequate to the risk becomes security to the other that he shall not suffer loss, damage, or prejudice by the happening of the perils specified to certain things which may be exposed to them." See *Lucena v. Craufurd*, 2 B. & P. N. R. 269, 301; *Cummings v. Cheshire County M. F. Ins. Co.*, 55 N. H. 457, 458. It differs from a contract of warranty or for services by the fact that the consideration is paid simply for assuming the risk and is not proportional to the property or services expected in return. *Cole v. Haven*, 7 N. W. 383 (Ia.); *Commonwealth v. Provident Bicycle Association*, 178 Pa. St. 636, 36 Atl. 197. It differs from the ordinary contract of suretyship, because of its separate development historically; but modern corporations which make a business of acting as sureties for fixed premiums are recognized as insurance companies.

See *Cowles v. United States Fidelity and Guaranty Co.*, 32 Wash. 120, 124, 72 Pac. 1032, 1033; RICHARDS, INSURANCE LAW, 3 ed., § 469. It differs from a wagering contract by the requirement that the insured must at the time of making the contract expect to suffer some worldly loss or liability if the contingency happens, though the misfortune for which he is to be indemnified need not be the loss of a legal right or the incurring of a legal liability. *Le Cras v. Hughes*, 3 Doug. 81; *Lord v. Dall*, 12 Mass. 115. The indemnity promised need not be a money payment. *Beals v. Home Ins. Co.*, 36 N. Y. 522; *Tolman v. Manufacturers Ins. Co.*, 1 Cush. (Mass.) 73. In the light of these broad principles, the decision of the principal case seems well founded. But the authorities are divided. *Accord, Physicians' Defense Co. v. O'Brien*, 100 Minn. 490, 111 N. W. 396. *Contra, State v. Laylin*, 73 Oh. St. 90, 76 N. E. 567; *Vredenburg v. Physicians' Defense Co.*, 126 Ill. App. 509.

LEGACIES AND DEVISES — ADEMPMENT — EFFECT OF MERGER OF COMPANY ON BEQUEST OF SHARES. — A testator bequeathed "twenty-three of the shares belonging to me in the London and County Banking Co." upon certain trusts. Between the date of the will and that of the testator's death the company amalgamated with another company, which resulted in a change of name and a new issue of capital, each original £80 share being subdivided into four £20 shares. *Held*, that the bequest passes ninety-two of the new shares. *Re Clifford's Estate*, 56 Sol. J. 91 (Eng., Ch. D., Nov. 9, 1911).

The theory that ademption of specific legacies depends upon intent has long been obsolete in England. *Stanley v. Potter*, 2 Cox 180. It is now well settled that whenever the specific thing devised has ceased to belong to the testator, the bequest is adeemed. *In re Bridle*, 4 C. P. D. 336. The weight of American authority is in accord with the English cases. *Snowden v. Banks*, 9 Ired. (N. C.) 373. *Contra, Joynes v. Hamilton*, 98 Md. 665, 57 Atl. 25. Nevertheless, a legacy is not adeemed if the alteration is purely formal. *Oakes v. Oakes*, 9 Hare 666. Such is the case where there is a mere subdivision of a company's shares. *Re Greenberry*, 55 Sol. J. 633. Where, on the other hand, the new shares represent an interest in a substantially different company, the change is more than a mere matter of form. The principal case seems opposed to previous English decisions. *Cf. In re Slater*, [1907] 1 Ch. 665; *In re Gray*, 36 Ch. D. 205. It is, however, in accord with American authorities. *In re Peirce*, 25 R. I. 34, 54 Atl. 588; *Skipwith v. Cabell's Exr.*, 19 Grat. (Va.) 758. Though hardly consistent with the strict theory of ademption, the result of the principal case seems desirable, since the likeness of the new shares to the old is more important than their differences. The case is further complicated by a provision of the Wills Act, which was rightly held not to affect the result. 7 WILL. IV. & 1 VICT. c. 26, § 24. But *cf. In re Slater, supra*.

MARRIAGE — NULLIFICATION — ALLOWANCE TO WIFE. — A marriage was annulled on account of the wife's incapacity, theretofore unknown to her. During the eighteen years from the marriage to its annulment the husband accumulated \$70,000. *Held*, that an allowance to the wife of \$10,000 is not improper. *Coats v. Coats*, 118 Pac. 441 (Cal.).

Alimony is allowed in divorce proceedings in lieu of the wife's right to future support. See *Ex parte Spencer*, 83 Cal. 460, 464, 23 Pac. 395, 396. Nullification proceedings present no such basis for alimony, for by the decree the wife's right to support is avoided. *Willits v. Willits*, 76 Neb. 228, 107 N. W. 379. Consequently, the orthodox view disallows alimony in such cases. *Stewart v. Vandervoort*, 34 W. Va. 524, 12 S. E. 736. See GODOLPHIN, ECCLESIASTICAL LAWS, 509. The wife may have several minor remedies. She can recover for fraud in procuring the marriage. *Blossom v. Barrett*, 37 N. Y. 434. The husband, being liable for household expenses until nullification, must reim-

burse the wife if she has paid them. *Hunt v. Hunt*, 23 Okl. 490, 100 Pac. 541. She has a right to a part of the joint accumulations. *Werner v. Werner*, 59 Kan. 399, 53 Pac. 127. But in some cases these remedies may be grossly inadequate. Some jurisdictions have allowed alimony by statute in certain circumstances. *Barber v. Barber*, 74 Ia. 301, 37 N. W. 381. The same result is being achieved by judicial decision. *Strode v. Strode*, 3 Bush (Ky.) 227. The nondescript allowance, as yet bearing no specific name, takes the same form as alimony; for its size is within the discretion of the court, having regard to all the circumstances. The novelty of the doctrine readily explains the slight confusion with which the principal case achieves a just result.

MORTGAGE — PRIORITIES — SEVERAL NOTES SECURED BY SAME MORTGAGE.

— A., the owner of several notes secured by a trust deed, payable two and three years after date, assigned one of the two-year notes to B. and one of the three-year notes to C. The trust deed contained the provision that on default in payment of any of the notes, all should become due. After maturity of all the notes a bill was filed to foreclose the trust deed. *Held*, that all of the two-year notes should be paid first, then the three-year note assigned to C., and then the three-year notes retained by A. *Kuppenheimer v. Chicago Title and Trust Co.*, 43 Nat. Corp. Rep. 467 (Ill., App. Ct., Oct. 4, 1911).

In many jurisdictions the various assignees of notes secured by the same mortgage and maturing at different dates share *pro rata* in a distribution of the security irrespective of the order of maturity or assignment of their respective notes. *Donley v. Hays*, 17 Serg. & R. (Pa.) 400; *Wilson v. Eigenbrodt*, 30 Minn. 4, 13 N. W. 907. In one jurisdiction at least such assignees take priority in the order of assignment. *Cullum v. Erwin*, 4 Ala. 452; *Alabama Gold Life Ins. Co. v. Hall*, 58 Ala. 1. A large number of jurisdictions, however, hold that priority shall be determined by the order of maturity of the various notes. *Lyman v. Smith*, 21 Wis. 674; *Winters v. Franklin Bank of Cincinnati*, 33 Oh. St. 250. Nor is this order affected by the presence of an acceleration clause in the mortgage. *Leavitt v. Reynolds*, 79 Ia. 348; *Horn v. Bennett*, 135 Ind. 158, 34 N. E. 321, 956. *Contra*, *Pierce v. Shaw*, 51 Wis. 316, 8 N. W. 209. This view would seem preferable as giving effect to a probable intention of the parties that, by a prior date of maturity, which carries with it, in the absence of an acceleration clause at least, a prior right to foreclose, a party is to be entitled to a preference. The assignee, however, is usually allowed to prevail over the assignor irrespective of the order of maturity. *Parkhurst v. Watertown Steam Engine Co.*, 107 Ind. 594, 8 N. E. 635; *Anderson v. Sharp*, 44 Oh. St. 260, 6 N. E. 900. *Contra*, *Wood v. Trask*, 7 Wis. 566. The principal case illustrates the latter views, except that it prefers the assignor's two-year notes to the assignee's three-year note.

NEGLIGENCE — DUTY OF CARE — DISCONTINUANCE WITHOUT NOTICE OF A CUSTOM OF VOLUNTARILY GIVING WARNING. — The defendant, operating a rock quarry near the plaintiff's blacksmith shop, exploded a blast which frightened a horse being shod by the plaintiff so that it plunged and injured him. At the plaintiff's request, the defendant had habitually warned him before blasting, but on this occasion failed to do so. *Held*, that a complaint alleging these facts states no cause of action. *Hieber v. Central Kentucky Traction Co.*, 140 S. W. 54 (Ky.).

One is not originally obliged to notify a person in the plaintiff's situation before blasting. *Mitchell v. Prange*, 110 Mich. 78, 67 N. W. 1096. But, if he has habitually done so, it does not necessarily follow that the practice can be discontinued without warning. If a railroad, by withdrawing without notice signals from a crossing where they are usually displayed, causes injury to one relying on them, it is liable, though not originally bound to maintain signals

there. *Westaway v. Chicago, etc. Ry. Co.*, 56 Minn. 28, 57 N. W. 222; *Burns v. North Chicago Rolling Mill Co.*, 65 Wis. 312, 27 N. W. 43. The court recognizes this rule, but distinguishes the principal case on the ground that the train itself does the injury, while in this case not the blasting but the horse causes it. This distinction, even if true, goes only to the issue of legal cause, one of fact, whereas the difficult point is whether or not the defendant violated a duty. No satisfactory distinction is perceived, and if the railroad cases are right, the propriety of the decision in the principal case may well be doubted. There is, however, a tendency to limit the rule strictly to cases of the crossing-signal type. *O'Leary v. Erie R. Co.*, 51 N. Y. App. Div. 25, 64 N. Y. Supp. 511.

SALES — RISK OF LOSS — CONDITIONAL SALES. — The plaintiff sold the defendant a piano, title to remain in the seller till the price was paid. On the buyer's default after a portion of the price had been paid, the seller replevied the piano. Before termination of the suit the piano was destroyed without fault of the plaintiff. *Held*, that the defendant is not entitled to a return of the payment made. *Hollenberg Music Co. v. Barron*, 140 S. W. 582 (Ark.).

By the weight of authority a retaking of the property on default of the buyer precludes any right to the unpaid purchase price. *Rodgers v. Bachman*, 109 Cal. 552, 42 Pac. 448; *Perkins v. Grobben*, 116 Mich. 172, 74 N. W. 469. But it allows the seller to retain payments already made, since that was the bargain entered into. *Angier v. Taunton Paper Mfg. Co.*, 1 Gray (Mass.) 621. It seems obvious that in this state of the law a destruction of the property could not affect the rights of the parties. A conditional sale, however, should be treated as a mortgage by the buyer to the seller. Consequently the seller should be allowed to retake the property and sue for the purchase price. See WILLISTON, *SALES*, § 579. This has been allowed even when the seller has resold at a loss. *Dederick v. Wolfe*, 68 Miss. 500, 9 So. 350. It would follow that the buyer should also bear the total loss of the property. The seller, then, having a right to the purchase price, might keep payments already made. This view, adopted by the principal case, more accurately defines the rights of the parties, though in the immediate case the result is the same on either view. Under it the seller is forced to take simply as security, and a situation where he might have both the property and most of the purchase price is avoided.

TAXATION — WHERE PROPERTY MAY BE TAXED — SUCCESSION TAX ON SHARES OF JOINT STOCK COMPANY HELD BY NON-RESIDENT. — The decedent, a resident of New Jersey, owned shares in a joint stock company having its principal office in New York. An appeal was taken from an assessment of the stock at full valuation under the Transfer Tax Law of New York on the ground that it should be limited to that proportion of the value of the stock which the assets located in New York bore to the total assets. *Held*, that the appeal should be allowed. *Estate of Willmer*, 46 N. Y. L. J. 853 (N. Y., Surr. Ct., Nov. 22, 1911).

The transfer of corporation stock held by a non-resident may be taxed by the state of incorporation, for the law of that state is called upon to effect it. *Matter of Bronson*, 150 N. Y. 1, 44 N. E. 707. So the full value of the stock may be taxed, regardless of how much of the corporation's property is outside the state. *Matter of Palmer*, 183 N. Y. 238, 76 N. E. 16. It would seem that shares in a joint stock company organized under the laws of the state should be similarly assessed. Though a joint stock company is not a creature of the state as a corporation is, to transfer a share the law of the state is similarly called upon. *Matter of Jones*, 172 N. Y. 575, 65 N. E. 570. The shares are not simply a proportional interest in partnership property. Though the stock company owns only realty, the shares are personalty. *Pittsburg Wagon Works' Estate*, 204 Pa. St. 432, 54 Atl. 316. But the decision is fair. In the analogous

case of a corporation incorporated in two states, each taxes the transfer of stock only on the proportion of property in its jurisdiction. *Gardiner v. Carter*, 74 N. H. 507, 69 Atl. 939. Moreover, the taxing of the transfer of stock in a domestic corporation owning property outside the state may have to be similarly limited under the doctrine that property taxable elsewhere cannot be taxed by the state of incorporation. See *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 Sup. Ct. 36.

TRIAL — PROVINCE OF COURT AND JURY — RIGHT OF COURT TO QUESTION WITNESSES. — In the course of a trial for murder the judge questioned several witnesses in order to develop their testimony more fully than the prosecuting attorney had done. *Held*, that this is not error. *State v. Keehn*, 118 Pac. 851 (Kan.).

In England it has always been considered the right and duty of the trial judge to question witnesses already on the stand or even to call a new witness when he deems it desirable to bring out the truth more fully. *Coulson v. Disborough*, [1894] 2 Q. B. 316. A few American decisions also seem to give him a wide discretion in this matter. *Epps v. State*, 19 Ga. 102; *Lefever v. Johnson*, 79 Ind. 554. But the tendency in this country has been to restrict the exercise of this discretionary power. *Dunn v. People*, 172 Ill. 582, 50 N. E. 137; *Barlow Brothers Co. v. Parsons*, 73 Conn. 696, 49 Atl. 205. The principal case shows a wholesome reaction from this narrow policy. See 1 WIGMORE, EVIDENCE, § 784; 4 *id.* § 2484.

TRIAL — VERDICTS — SPECIAL FINDINGS. — In an action for negligence the defense of contributory negligence was interposed. In answer to a question of the court as to whether the plaintiff used due care, the jury answered, "We do not know." On a general verdict for the plaintiff the plaintiff obtained judgment. *Held*, that the judgment should be reversed. *Minor v. Stevens*, 118 Pac. 313 (Wash.).

In states where the jury can be required to render special findings the general rule is that a party can insist on a definite answer to interrogatories submitted to the jury. *Atchison, etc. Ry. Co. v. Hale*, 64 Kan. 751, 68 Pac. 612. Where the party does not insist on a definite answer, the better view is that a finding such as the one in the principal case is equivalent to a finding adverse to the party having the burden of proof of the issue. *Croan v. Baden*, 73 Kan. 364, 85 Pac. 532. *Contra*, *Darling v. West*, 51 Ia. 259, 1 N. W. 531. Contributory negligence is an affirmative defense in Washington. *Spurrier v. Front Street Cable Ry. Co.*, 3 Wash. 659, 29 Pac. 346. The decision of the principal case would therefore seem difficult to support.

TRUSTS — CESTUI'S INTEREST IN RES — APPORTIONMENT OF RENT BETWEEN LIFE-TENANT AND REMAINDERMAN. — A lease of trust property was made, by which "rent" was to be paid in a certain sum in cash at the signing of the lease and monthly payments thereafter. *Held*, that the sum paid on signing the lease should not be apportioned in monthly payments throughout the term to the successive *cestuis que trust*. *In re Archambault's Estate*, 81 Atl. 314 (Pa.).

Strictly, the cash payment here is not rent, but something given in addition to it. Cf. *Hatherton v. Bradburne*, 13 Sim. 599; *Ardesco Oil Co. v. North American Oil and Mining Co.*, 66 Pa. St. 375. See 2 WOOD, LANDLORD AND TENANT, § 445. Such a bonus paid for the privilege of obtaining the lease is a form of casual profits, and the decision appears sound in treating it as income and not *corpus*. A close analogy exists in the fines for renewal of a lease, always considered as income. *Milles v. Milles*, 6 Ves. 761. See LEWIN, TRUSTS, 12 ed., 876. And even if we follow the court and treat the payment as rent, it should properly

go to the life-tenant, for rent is not apportionable at common law, though paid in advance. *Agnew's Estate*, 17 Pa. Super. Ct. 201; *Ellis v. Rowbotham*, [1900] 1 Q. B. 740. It is obvious, however, that if a disproportionately large amount of the rent were paid down and a nominal amount yearly, it would be a lease unfair to the remainderman and void. *Cf. Doe d. Sutton v. Harvey*, 1 B. & C. 426; *FAWCETT, LANDLORD AND TENANT*, 3 ed., 53-54. For equity will compel the trustee to perform his duties impartially.

WILLS — EXECUTION — SIGNATURE OF ATTESTING WITNESS. — An attesting witness to a will inadvertently signed the testator's name instead of his own. A statute provided that each of the attesting witnesses should sign his name as a witness. *Held*, that the will is entitled to probate. *In the Matter of Jacobs*, 73 N. Y. Misc. 162 (Surr. Ct.).

The Statute of Frauds provided that devises of lands should be attested and subscribed by three or four witnesses. STAT. 29 CAR. II. c. 3, § 5. It is well settled by the decisions under the Statute of Frauds and statutes with like provisions that this requirement is satisfied by any writing *animo attestandi*. *Harrison v. Harrison*, 8 Ves. 185; *Goods of Olliver*, 2 Spinks Ecc. Cas. 57. The same result has generally been reached under statutes like the New York statute. *Morris v. Kniffin*, 37 Barb. (N. Y.) 336; *Garrett v. Heflin*, 98 Ala. 615, 13 So. 326. A similar statute in California, however, has been more strictly construed, the court holding that a provision that an attesting witness must sign his name is not satisfied by the signing of a name other than that of the witness. *Estate of Walker*, 110 Cal. 387, 42 Pac. 815. *Cf. Stewart v. Beard*, 69 Ala. 470. The view of the California court would seem preferable to that expressed in the principal case.

WITNESSES — COMPELLING TESTIMONY — SUBPÆNA DUCES TECUM TO EMPLOYEE TO PRODUCE EMPLOYER'S BOOKS. — An employee of a firm, being in charge of one of the departments of the business, was served with a *subpœna duces tecum* to produce certain documents which belonged to his employers, but were in the department of which he had charge. He refused to produce them. *Held*, that in the absence of evidence of authority from his employers, the order for a writ of attachment should be discharged. *Eccles & Co. v. Louisville & Nashville R. Co.*, 28 T. L. R. 67, 132 L. T. 86 (Eng., C. A., Nov. 17, 1911).

To enforce a *subpœna duces tecum* the document must be in the control of the witness. *Amey v. Long*, 9 East 473; *Lee v. Angas*, L. R. 2 Eq. 59. See 4 WIGMORE, EVIDENCE, § 2200 (4). What is sufficient control is largely a question of the facts of each case. *Campbell v. Earl of Dalhousie*, L. R. 1 H. L. Sc. 462. Although one may be legally the possessor of the document, another may have such custody of it as to warrant the issuing of a *subpœna* to him. *Corsen v. Dubois*, 1 Holt 239; *Amey v. Long*, 1 Camp. 14. On the other hand, it would seem that the legal possessor, though not having actual custody at the time, could be subpœnaed. *Steed v. Cruise*, 70 Ga. 168. But an employee ordinarily has no such control over his master's papers as to warrant his being ordered to bring them into court. *Queen v. Stuart*, 2 T. L. R. 144; *Crowther v. Appleby*, L. R. 9 C. P. 23. See *Lorenz v. Lehigh Nav. Co.*, 5 Leg. Gaz. (Pa.) 174. *Cf. King v. Daye*, [1908] 2 K. B. 333. So a steward has been held not compellable to produce papers belonging to his master. *Earl of Falmouth v. Moss*, 11 Price 455. *Cf. Attorney-General v. Wilson*, 9 Sim. 526. So as to a bank clerk. *President, etc. of Bank of Utica v. Hillard*, 5 Cow. (N. Y.) 153, 419. And a clerk in a public office. *Austin v. Evans*, 2 M. & G. 430. The rule laid down in the principal case that the party calling for the papers must show that the witness has the ability to bring them into court is well recognized. *Hall v. Young*, 37 N. H. 134.

WITNESSES — IMPEACHMENT — ADMISSIBILITY OF SUBSEQUENT INCONSISTENT STATEMENTS OF ABSENT WITNESS. — In the absence of a witness from the jurisdiction his testimony in a former trial of the same cause was admitted. It was then sought to introduce an *ex parte* affidavit made subsequently wherein the witness confessed the falsity of this testimony. *Held*, that the affidavit is inadmissible, since the witness must first be questioned as to the circumstances of making it. *Baker v. Sands*, 140 S. W. 520 (Tex., Ct. Civ. App.).

A witness's testimony cannot be impeached by inconsistent statements without first directing his attention to them and the circumstances when they were made. *Queen's Case*, 2 B. & B. 284; *Trumble v. Happy*, 114 Ia. 624, 87 N. W. 678. *Contra*, *Tucker v. Welsh*, 17 Mass. 160. This is necessary to give the witness opportunity for denial or explanation. But where his death or absence renders the requirement impossible of performance, the impeaching party loses valuable evidence. For this reason, dying declarations may be impeached by contradiction, though a foundation cannot be laid. *Carver v. United States*, 164 U. S. 694, 17 Sup. Ct. 228; *State v. Lodge*, 9 Houst. (Del.) 542, 33 Atl. 312. *Contra*, *State v. Taylor*, 56 S. C. 360, 34 S. E. 939. It is held, however, that to impeach former testimony or depositions, the preliminary question is indispensable, since there has been opportunity to lay the foundation. *Jenkins v. Lutz*, 26 Ind. App. 150, 59 N. E. 288; *Ayers v. Watson*, 132 U. S. 394, 10 Sup. Ct. 116. But in the principal case the contradictory statement was made after the opportunity for cross-examination. The weight of authority, however, refuses to extend the exception beyond dying declarations. *Craft v. Commonwealth*, 81 Ky. 250; *Mattox v. United States*, 156 U. S. 237, 15 Sup. Ct. 337. *Contra*, *Downer v. Dana*, 19 Vt. 338. The rule produces the curious result that, of contradictory depositions by an unavailable witness, the party introducing a deposition first is immune from attack. The witness should not be sheltered to the miscarriage of justice. The solution lies not in extension of the exception, but in making the requirement of the question discretionary. *Rothrock v. Gallaher*, 91 Pa. St. 108. See 13 HARV. L. REV. 306. This the court recognizes, but rests its decision upon the impeacher's opportunity to lay the foundation by deposition.

WITNESSES — PRIVILEGED COMMUNICATIONS — HUSBAND AND WIFE. — In an action for separation for cruelty the wife sought to introduce evidence of statements made to her by the defendant, a physician, as to the necessity of an operation for abortion which she permitted him to perform. *Held*, that the evidence is not privileged as a marital communication. *Sheldon v. Sheldon*, 131 N. Y. Supp. 291 (App. Div.).

The reason for the privilege against disclosure of confidential communications is the belief that it is socially desirable to foster certain relations of confidence. See 4 WIGMORE, EVIDENCE, §§ 2285, 2332. This case decides that when two of these relations coincide, the fact that a husband makes a statement to his wife in his capacity as physician puts an end to the privilege based on the marital relation and leaves only the other privilege, due to the physician and patient relation, waivable by the patient. It is submitted that the court thus creates an illogical and impolitic limitation on the protection given to confidences between husband and wife. The actual result, however, is desirable, for the action is between the spouses for a wrong done to the one by the other. In such circumstances the reason for the privilege ceases and it should cease also. See 4 WIGMORE, EVIDENCE, § 2338 (2). Some legislatures have recognized this. See *People v. Warner*, 117 Cal. 637, 639, 49 Pac. 841; *Goelz v. Goelz*, 157 Ill. 33, 41, 41 N. E. 756, 758. The New York legislature has not, and the court endeavoring to work justice has adopted a rule undesirable in actions not between the couple.

BOOK REVIEWS.

INTRODUCTION TO THE STUDY OF LAW. A Handbook for the Use of Egyptian Law Students. By Frederic M. Goadby. London: Butterworth and Company. 1910. pp. xiii, 384.

Partly from a praiseworthy modesty, which is manifest throughout the book, and partly to avoid the misunderstandings inevitably attaching to the term wherever French law is paramount, Mr. Goadby has refrained from giving his book the title of an introduction to or treatise upon Jurisprudence. Primarily it is designed for an introduction to the history and system of the law administered in Egypt. But the circumstances of a French code, administered to an increasing extent along English lines to a people predominantly Mohammedan, and so governed in many matters by the Mohammedan law, affords an unusual opportunity for use of the comparative method and gives the book more claim to be a treatise upon Jurisprudence than some more pretentious works which have assumed that title.

The exigencies of writing primarily for the Egyptian student have carried with them disadvantages and advantages. One disadvantage is that some explanations necessary for the author's immediate audience are elucidations of the obvious elsewhere. A characteristic example is the careful distinction of a Justice of the High Court, a Lord Justice and a Justice of the Peace from the abstract justice which they administer according to law. Another is the use of terms in senses well understood in French (and so in Egyptian) law or polity which differ from those which we employ. For example, when one reads that the Code of Justinian was a "collection of Imperial decrees" and that the Novels were later "decrees" (p. 10) the first impulse is to charge the author with gross carelessness or inaccuracy. But "decree" is used here in the French sense of executive law-making, if one may put it so, and it seems that in Egypt there is legislative law-making in the form of "laws" and executive law-making in the form of "decrees." Hence the word chosen conveys a clear notion of the true character of Roman imperial legislation to the Egyptian student, although it conveys a wrong idea to one who has in mind the Roman *decretum* or the Anglo-American judicial decree. On the other hand it is a real advantage that the book is made concrete and that old formulas have to stand the test of application to situations their framers had never heard of. Titius and Seius, otherwise John Doe and Richard Roe, in their Egyptian guise of Ahmed and Zaky, take on a new life.

In common with all recent English writers, the author, upon the whole, is an orthodox Neo-Austinian. Mr. Salmond, many years ago, did a distinct service to analytical jurisprudence by reviewing its main tenets in the light of German juristic writing and taking over and applying a number of German ideas. Mr. Goadby, writing for students who are governed by a French code, does a similar service in adapting to each other, as well as may be, the doctrines of the English analytical school and those of the modern French jurists. Some tendency toward the philosophical view is also manifest. In part this may be due to French influence. But the references to T. H. Green's Principles of Political Obligation, the best bit of philosophical jurisprudence in English, are encouraging. The influence of the recent German conception of the legal order, the end, as the important point rather than law, the means thereto, is also manifest, although we are told that the main problems of jurisprudence are two, the nature of law, and the nature of the principal legal relations (p. 5). The problems which have assumed greater importance recently, namely, the

end of law and the application of legal rules, are left out of the enumeration, although by no means lost sight of in the text.

Among the good features of the book which will be of interest here, note may be made of a suggestive application of Austin's theory to Mohammedan law (p. 38), an accurate and discriminating discussion of the French theory and practice as to the authority of judicial decisions and of the recent tendency to make "jurisprudence" a source of law (p. 90), a convenient note on French decisions, the publications containing them and the mode of citing them (pp. 92-94), a matter to which reference in English has not been easy heretofore, a similar note with respect to French doctrinal writings (pp. 106-107), a valuable note on recent Continental ideas as to interpretation (pp. 149-150) and a note on the nature of a juristic person (pp. 241-245) presenting the modern French view as well as the now familiar doctrine of Gierke.

On the other hand, the long exposition of Savigny's theory of law (pp. 44-48) is followed by no suggestion as to the present status of that theory and the social-philosophical views that are replacing it. Also the discussion of codification does not go beyond the well-trodden path of the controversy between Thibaut and Savigny, the Austinian critique of Savigny and the answer of the English historical jurists thereto. The author accepts Amos' statement that the argument of Savigny is unanswerable. It is true he does mention the refutation of the charge that the French code has hampered legal development which Saleilles made so thoroughly and convincingly. But he does so only to disparage it. To him the idea of a code is the Benthamian one. He had seen Carter's *Law: Its Origin, Growth and Function*, which he criticizes justly, but not Professor Gray's *Nature and Sources of Law*. One must feel that the discussion of sources of law might have been much better if the latter work had been consulted.

Sir Henry Maine's unhappy prophecy as to the effect of the Louisiana code may be responsible for the over-cautious statement that the common law is the basis of the law of "most" of the United States, "the *principal* exception being Louisiana" (p. 19). But it is not so easy to account for the reference to "Sir James Bryce" (p. 14).

But such criticisms may well leave a false impression. The book is one to which American teachers of jurisprudence will be glad to refer students for many things not otherwise available in English, and in which those who do not care to read French will find much valuable material for discussion.

R. P.

MODERN THEORIES OF CRIMINALITY. By C. Bernaldo de Quirós. Translated from the Spanish by Alfonso de Salvio, with an introduction by William W. Smithers. Boston: Little, Brown and Company. 1911. pp. xxvii, 249.

During the past century many changes and ameliorations have been made in our criminal law, but there has been practically no departure from its fundamental theory of personal responsibility. Of late years European writers have strongly attacked this theory and have sought to explain criminality on other grounds. For the purpose of making these new theories available for study and experiment in this country, the American Institute of Criminal Law and Criminology arranged for the translation and publication of certain of the most characteristic writings on criminology under the general title of the Modern Criminal Science Series. The purpose of the series is indicated by the following statement in the general introduction: "Which of the various principles and methods will prove best adapted to help our problems can only be told after our students and workers have tested them in our own experience. But it is certain that we must first acquaint ourselves with these results of a generation of European thought."

The present volume is the first of the series and is in scope a classified bibliography, with a brief statement and comparison of the most important theories. The author says in the preface to the first Spanish edition: "It is a work essentially of information, seldom altered by the personal reflections of the author." The book contains three chapters of which the third was written for the present edition.

In the first chapter criminology is traced from its sources in the occult sciences and psychiatry, and then are set forth the theories of the "three innovators," Lombroso, Ferri, and Garofalo, who are designated as anthropologist, sociologist, and jurisconsult respectively. In the section on the development of criminology, the various theories are divided into two general groups, the anthropological and the sociologic. The great controversy between the anthropologists and the sociologists is stated to be: "Is the criminal born so, or is he a product?" Anthropological theories are divided into atavistic, of degeneration, and pathologic; sociologic theories, into anthropo-sociologic, social, and socialistic.

In the beginning of the second chapter the reforms in the criminal law accomplished by Beccaria and Röder, and the reformation of penitentiary science by John Howard, are briefly referred to. The author says that modern penology has three tendencies, the traditional, the reformistic, and the radical. The reformers who "advocate the traditional penal measures for certain delinquents only with a repressive aim, while for others they reserve preventive measures against relapse and imitation, in accordance with the teachings of modern criminology," are said to be in the majority everywhere. The greater portion of this chapter is devoted to a consideration of the "applications" of criminal law and penitentiary science to delinquents, who are classified as minors, adults without criminal record, and adult recidivists. Under this head juvenile courts, the American system of probation, the English system of conditional sentence, pardon, deportation, indeterminate sentence, reformatories, and capital punishment are discussed. There are also sections on responsibility, prevention of delinquency, and reparation of the injury caused by crime.

In the third chapter, the author treats of the identification of criminals by anthropometry and dactyloscopy. He also considers scientific methods of obtaining evidence, and the value of testimonial evidence. In conclusion he reviews briefly the entire subject and indicates the problem for the future.

Two significant conclusions may be drawn from the subject matter of this book. The first is that the problem of dealing with the criminal may be approached from opposite standpoints. His physical and social condition may be made the test for determining his responsibility to the law for the wrong done, or this condition may be considered in selecting the treatment to be accorded him after he has been convicted. The former represents the attitude of the European criminologists; the latter is the method that has been largely pursued in this country, where important penal reforms, such as the probation system, the indeterminate sentence, and the reformatory system, have originated. The second conclusion is that the theories of the modern school of criminology are as yet unproved. They are still in the propagandic stage, and should neither be rejected without study and trial, nor be accepted as established. It would seem that Mr. Smithers assumes too much when he says in his introduction: "The criminal being the product of cosmic, biological, or social influences which put him out of harmony with conventional morality and cause him to disturb the recognized aims of community existence, must be treated as a ward of the State for the purpose of curing his impairment and meanwhile keeping him so sufficiently restrained as to prevent injury to others."

E. R. K.

THE LAW OF FRAUDULENT CONVEYANCES. By Melville Madison Bigelow. With Editorial Notes by Kent Knowlton. Boston: Little, Brown and Company. 1911. pp. lxi, 762.

In the two volumes published in 1888 and 1890, entitled "A Treatise on the Law of Fraud on its Civil Side," Dean Bigelow set himself the task of defining fraud and covering as a whole the entire field indicated in the title. For this purpose he divided fraud into two parts: "In the one the person defrauded and the person defrauding have been dealing with each other; that part is 'deception.' In the other they have not been dealing with each other; that part is 'circumvention.'" The first part of the subject, so divided, was covered in the earlier volume. Circumvention was the subject of the second volume, which treated fraudulent conveyances and a few other matters under the heading of evasion.

The present book is the second volume, newly edited, and issued as a separate treatise, with the matters other than fraudulent conveyances omitted. This is a departure from the author's original intention of defining fraud and covering the whole subject (as a matter of civil law) in a single treatise. Tort for deceit and fraudulent conveyances are well-defined topics, but otherwise the subject of fraud lacks continuity, entering, as it does, into so many otherwise unrelated fields as to render it inherently difficult to treat as a whole, — the difficulty increasing with the development of the law. Had this new volume covered the entire field of its predecessor, we should, for example, have expected it to contain a discussion of the effect, or supposed effect, of "fraud" in rendering corporate organization substantially ineffective, and a definition of such "fraud," — a subject which is properly a part of the law of corporations and can best be treated only in that connection. Other instances occur which, with other considerations, show the wisdom of publishing the present volume as a separate work.

The new volume is substantially similar to that part of the old which dealt with fraudulent conveyances, there being but few omissions, and a few slight alterations, from the original text. The author's notes are enlarged, and new citations added, by indicated insertions; also there is a new series of notes by the editor. These include, among various comments upon the text and upon collateral points, a long note upon conditional sales, a note on Sales of Goods in Bulk Acts, and several notes occasioned by the Federal Bankruptcy Act, which is not treated in the text.

A. R. G.

CONSTITUTIONAL LAW. By James Parker Hall. Chicago: La Salle Extension University. 1911. pp. xiv, 457.

This volume was prepared not for the practitioner nor for the student of law, but for the general reader. The plan includes an enunciation of the principal doctrines and a statement of a considerable number of the principal cases. As the plan is a good one and is executed with care, the result is a volume the usefulness of which extends beyond the circle of those non-professional readers whose needs it aims to fill, and any person of intelligence, whether layman or lawyer, will find it thoroughly interesting. Moreover, as the book does not excessively quote from judicial opinions and is in no sense a paraphrase of earlier treatises, it deserves to be recognized, notwithstanding its modest purpose, as a noticeably honest piece of work.

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A PROBLEM IN THE DRAFTING OF WORK- MEN'S COMPENSATION ACTS.

[I.—*Continued.*]

"Arising out of and in the Course of Employment."

"ARISING out of, points to the origin or cause of the accident, and, in the course of, to the place and circumstances under which the accident takes place"¹ and the time when it occurred.²

The injury must be received in the course of employment and must also arise out of it; neither alone is sufficient.³ In the great

¹ Buckley, L. J., in *Fitzgerald v. Clarke & Co.*, [1908] 2 K. B. 796, 1 B. W. C. C. (Butterworth's Workmen's Compensation Cases) 197 (C. A., 1909).

² See Loreburn, L. C., in *Moore v. Manchester Liners, Ltd.*, [1910] A. C. 498, 500, 3 B. W. C. C. 527, 529: "The first inquiry is, Was he doing any of the things which he might reasonably do while employed? . . . The next inquiry is, Did the accident occur within the time covered by the employment? . . . The last inquiry is, Did the accident occur at a place where he may reasonably be while in the employment?" Not only is this definition extremely vague but it is contained in a dissenting opinion by Lord Loreburn, holding, contrary to the majority of the House of Lords, that, judged by this test, the plaintiff was in the course of employment. And see Lord Justice Farwell's criticism of it in *Kitchenham v. S. S. Johannesburg*, [1911] 1 K. B. 523, 531.

³ It may appear at first glance that unless the servant is actually engaged in work in the course of his employment no injury sustained by him can be caused by it and so arise out of it. See Farwell, L. J., in *Kitchenham v. S. S. Johannesburg*, [1911] 1 K. B. 523, 530, and the Lord President in *M'Lauchlan v. Anderson*, 48 Scot. L. Rep. 349, 4 B. W. C. C. 376 (Ct. Sess., 1911). While this is generally true, cases may arise where an injury is caused by an employment which at the time of the accident the servant has, under the decisions, left or not yet entered upon. An injury sustained by a servant on his way to or from work at some highly dangerous place over which,

majority of cases the requirement that the injury be received in the course of the employment is the broader of the two, the requirement that it must arise out of the employment in general operates to restrict recovery to such injuries only, among those which the workman sustains while in the course of his employment, as also arise out of it.

The phrase "in the course of employment" presents two principal questions. The first concerns the period of employment. When does it begin and end, and, during this period, when is its continuity broken? The second raises the question as to how far the servant during the period of employment places himself outside thereof by doing that which he is not employed to do, or by doing his appointed work at a place other than that which his master has appointed for that purpose, or by deliberately adopting a method of performing the work other than that prescribed by his master or forbidden by him.

After some little vacillation it is finally settled that the term "in the course of his employment" is not limited to those periods during which the servant is actually engaged upon work which he is employed to perform. "'In the course of employment' does not mean 'in the course of industrial work.'"⁴ Nor is it limited to the time for which wages are paid. Indeed the fact that the workman is paid wages for the time when the accident occurs is of little, if any, importance.

On the other hand, it is well settled that the course of employment does not include all the many acts of which the employment is the sole or at least predominant cause, which are done solely because the doer is engaged in a particular employment at a particular place, and which neither an idle man nor one engaged in another employment would have occasion to do.⁵ So wide a construction

though outside the master's premises, he is obliged to pass, seems to be as directly caused by his employment as an injury received upon his master's premises, but before or after his actual work has begun or ended. See Lord McLaren in *Menzies v. McQuibban*, 2 Fraser 732, 735-736 (Scot. Ct. Sess., 1900). In such cases recovery is denied solely on the ground that the employment is held not to begin until the servant enters his master's premises and to end when he quits it. See *Holness v. Mackay & Davis*, [1899] 2 Q. B. 319, 1 W. C. C. (Workmen's Compensation Cases) 13, which seems to have been such a case.

⁴ *Fletcher Moulton, L. J.*, in *Riley v. Holland & Sons, Ltd.*, [1911] 1 K. B. 1029, 1033.

⁵ See *Holness v. Mackay & Davis*, [1899] 2 Q. B. 319, 1 W. C. C. 13, where the workman was not only required to go upon a railway company's premises and cross its

would include not only the whole of the journey to and from work upon the public highways and premises of third persons, but also every act done in preparation for the employment, even to the putting on of working clothes at the workman's home.

The course of employment, therefore, is neither limited to the period of actual labor nor is it extended to include all acts necessitated by the workmen's employment. The workman is not regarded as outside the scope of his employment unless actually at work or in the receipt of wages, nor is he regarded as within it because what he is doing is something which has relation only to his work. The test finally adopted lies between the two. The place at which the injury is sustained becomes the determining factor among those things which he does solely because he is engaged in a particular employment; only those are regarded as in the course of the employment which are done within the master's premises or upon some means of conveyance to or from his place of work which is provided by the master for the sole use of his servants and which the servant is required or entitled to use by virtue of his contract of employment.

The employment may be either for an extended period, as a week, month, or year, during which the master is entitled to the entire time of the workman, as in the case of seamen and domestic servants, or on the other hand, it may be for a limited number of hours in each day, as in the case of laborers and employees in factories. If the employment be in the first class, it seems reasonably well settled that the employment begins when the employee presents himself at the beginning of his term of service upon his master's premises, or at the place designated by the latter. The only difficult questions which arise are those concerning his temporarily quitting the service and his return thereto. It is only in those cases where the employment is to devote a certain number of working hours to some definite piece of work that the question as to when the employment begins and ends usually becomes vital.⁶ In the great

tracks because of his employment by a contractor with the railway, but would have been a trespasser had it not been for the implied license which he had as the servant of the contractor.

⁶ This question of course arises once even in an employment of an extended time, *i. e.* when the servant originally goes into service. See *Whitbread v. Arnold*, 99 L. T. 103, 1 B. W. C. C. 317 (C. A., 1908). But it arises daily when the employment is for a number of hours a day.

majority of such employments neither the actual work nor the wages begin until after the workman has reached some point well within his master's premises or the place at which the master is carrying on his business.

Both the English and Scottish cases agree that the employment begins when the workman has arrived at the place where his actual work is to be done though the work itself has not begun. And they agree that he is in the course of his employment if he is engaged in doing some act which he is required to do upon the employer's premises in preparation for his labor, or when he reaches some place upon his employer's premises where such required preparatory work is to be done.⁷ The English cases go further, and regard him as in the course of his employment when he is using as a means of approach to or exit from the scene of his duties some part of his master's premises, provided by the master for such use or which the workmen have used for this purpose with the master's knowledge and with his consent, or at least without his prohibition.⁸

⁷ *Anderson v. Fife Coal Co., Ltd.*, [1910] Scot. Sess. Cas. 8, 3 B. W. C. C. 539, in which it was held that a miner was not in the course of his employment until he had reached the spot where he was to get his lamp. The Lord Justice Clerk rejects the rule that the moment a man enters the premises of his master he is in the course of employment, and adopts the rule that "he must come to some point at which he enters upon the work which he has to do." Compare *Tod v. The Caledonian Ry. Co.*, 1 Fraser 1047 (Scot. Ct. Sess., 1899), with *Caton v. The Summerlee, etc. Co., Ltd.*, 4 Fraser 989 (Scot. Ct. Sess., 1902). But see *Haley v. The United Collieries, Ltd.*, [1907] Scot. Sess. Cas. 214; *Hendry v. The United Collieries, Ltd.*, 47 Scot. L. Rep. 635, 3 B. W. C. C. 567 (Ct. Sess., 1910), in which workmen, injured in the one case on his way to get his pay and in the other on his way home, were denied compensation not because they were not at their working places but because they had not used the paths provided by their employers.

⁸ *Gane v. Norton Hill Colliery Co.*, [1909] 2 K. B. 539, 2 B. W. C. C. 42; *Hoskins v. J. Lancaster*, 3 B. W. C. C. 476 (1910). It is enough that the workman is using a path or route which is customarily used by workmen to the master's knowledge, at least if the master has not forbidden its use. While a workman may not loiter unnecessarily upon his employer's premises, *Smith v. South Normanton Colliery Co., Ltd.*, [1903] 1 K. B. 204, 5 W. C. C. 14; *Benson v. Lancashire & Yorkshire Ry. Co.*, [1904] 1 K. B. 242, 6 W. C. C. 20, he is allowed a reasonable time to get to and from his work. What is a reasonable time depends on the circumstances of the case. So if the workmen are obliged to come and go by trains which arrive and leave some little time before and after the work begins and ends, the workmen are not required to pass these intervals on the public highways, but are in the course of their employment while passing them upon their employer's premises, especially if their custom of so doing is known to their employer and he has provided for their accommodation. *Sharp v. Johnson & Co.*, [1905] 2 K. B. 139, 7 W. C. C. 28.

And a workman is held to be in the course of his employment while traveling to or from his work upon the conveyance which, though not owned or controlled by the employer, is provided by him for the sole use of the employees and which the workman, though not required, is permitted to use by virtue of his contract of employment.⁹

⁹ *Cremins v. Gest, Keene & Nettlefolds, Ltd.*, [1908] 1 K. B. 469, 1 B. W. C. C. 16. In this case mine owners provided a daily train by which their employees traveled to and from the nearest town to the mines. The coaches were the property of the employers, but the engine was owned by the railway, which operated the train with its own crew and over its own line. The train was run exclusively for the use of the miners, no charge being made for conveyance upon it; but the miners were not required to travel by it and no allowance was made to those who did not travel by it.

The accident happened at the platform upon the railway property which had been constructed by the mine owners and was repaired by them. The platform was two hundred yards from the mine premises, and in order to reach them the miners had to pass along a public highway. The claimant's decedent was killed by being pushed from the platform in front of a train by a rush of fellow workmen who were seeking to board the train. Therefore, while the coaches were owned by the employers and the platform was repaired by them, the injury was not received by reason of any bad condition therein, and the case seems to stand for the broad proposition before stated. It would seem that the mine owners would have been liable as fully had they not owned the coaches nor had provided the platform and had control of it for the purpose of lighting and repairs. See, however, *Davies v. Rhymney Iron Co.*, 16 T. L. R. 329, 2 W. C. C. 22 (C. A., 1900), and *Walters v. Stavely & Co.*, 4 B. W. C. C. 89 (C. A., 1910), 4 B. W. C. C. 303 (H. L., 1911), especially Lord Shaw, pp. 305-306, and *cf. Holmes v. Gt. Northern Ry. Co.*, [1900] 2 Q. B. 409, 2 W. C. C. 19.

It is difficult to reconcile this case with *Whitbread v. Arnold*, 99 L. T. 103, 1 B. W. C. C. 317 (C. A., 1908), decided six months later by the Court of Appeal, *Cozens-Hardy, M. R.*, sitting in both cases, in which it was held that a shepherd was not in the course of his employment under the following circumstances: In accordance with the general custom among the farmers it was a part of the contract between the farmer and those whom he engaged as farm laborers that a wagon should be sent by the farmer on the day when the servant was to begin, to convey the laborer and his family and goods from his residence to the cottage which was furnished as a part of his compensation. While proceeding in this wagon to the farm he was thrown from the wagon and killed; it was held that the employment would not commence until the deceased had entered upon his duties as shepherd.

It is not enough that the employer shall provide railway tickets where the employment is to be at a distance from the workmen's residence, but the conveyance must be one provided by the master for the sole use of servants, and upon which his servants alone, because of their service, have the right to travel. The present of the ticket is either a pure gratuity or a part of the wages paid, and the master is no more liable to one using it than he would be to a servant to whom he had given a sum to pay his car fare or to whom he had paid an additional wage because the servant lived at a distance and required the additional sum for this purpose. It is highly doubtful whether American courts will hold that servants in circumstances like that of *Cremins'* case are in the course of employment. The general trend of American authority is to

It is not necessary that the servant should be on his way to or from his actual labors. He is in the course of employment if he goes on the premises where his employer's business is being carried on for the purpose of preparing himself for his work, as by obtaining information as to when his work will begin at some future time,¹⁰ or for the purpose of getting pay which it is the master's duty under the contract of employment to pay to the workmen upon his premises; and this is so whether the workman is still in the master's employment or whether the relation of master and servant has entirely ceased, nothing remaining to be done except pay off the servant.¹¹

The general result reached by the English cases may be stated as follows: The workman is regarded as in the course of his employment when he is upon the premises upon which his master's business is being carried on, if his presence thereon is incidental to his work, and is therefore required or sanctioned by his contract of employment. The place at which the workman was injured becomes the determining factor. Nothing done outside his master's premises is in the course of employment. It is not enough that the servant be upon land owned by the master; he must be within the boundaries of those premises where the master's business is being carried on and the servant's work is to be done.¹²

hold that a servant of a railway, traveling upon the train of the company on a free pass or upon a train provided by the company for its employees, is a passenger and not a workman at all unless he is obliged to travel by a train provided especially for the carrying of workmen of his class.

¹⁰ But not when a servant who has been paid off returns to the premises to complain of a supposed error in the amount. *Phillips v. Williams*, 4 B. W. C. C. 143 (C. A., 1911).

¹¹ Or where he goes on the premises to remove his own tools some days after he has been discharged or has quitted the defendant's service. *Molloy v. South Wales, etc. Co.*, 4 B. W. C. C. 65 (C. A., 1910).

¹² *Gilmore v. Long & Co.*, 4 B. W. C. C. 279 (C. A., 1911). And this is so though the master has provided a path over such other land, chiefly for the convenience of his workmen to whom it provides a short cut between two highways. *Walters v. Stavely & Co.*, 4 B. W. C. C. 89 (C. A., 1910), 4 B. W. C. C. 303 (H. L., 1911). *Cf. Cremins v. Gest, Keene & Nettlefolds, Ltd.*, [1908] 1 K. B. 469, 1 B. W. C. C. 16, *ante*, note 9. See also *Parker v. Pont* (C. A., Oct., 1911), briefly reported in 131 L. T. J. 552.

Gilmore v. Long can be reconciled with *Taylor v. Jones*, 123 L. T. J. 553, 1 B. W. C. C. 3 (*Ely Co. Ct.*, 1907), in which a farm laborer was allowed compensation for an injury received while climbing a stile on his employer's farm several fields from that where he was to work, only by regarding as decisive the fact that the place of the injury and of the work are on the same tract.

When a servant, employed for an extended period, has temporarily quitted his employment, with or without his master's leave, the question arises as to whether he has reëntered the employment. This question is most frequently presented in those cases¹³ where sailors who have gone on shore-leave are injured in returning to their vessel. Accidents to sailors under these particular circumstances are particularly frequent for two reasons: One, their tendency to drink to excess when on shore; and the other, that in their return to the ship they are subjected to certain special risks. When their ship is in the roads it can only be reached by boat; even when it is in dock, the approach to it is usually along ill-lighted quays and over slippery ladders and insecure gangways.

A sailor may be sent ashore on a ship's errand, in which case his employment continues though not upon the vessel;¹⁴ or, on the other hand, he may have gone ashore with leave but for some private purpose of his own, or he may have gone off without leave. In either case he temporarily quits the service, and his right to recover depends upon whether at the time he is injured he has or has not reëntered it.

A distinction is indicated, though not clearly expressed, between sailors going ashore with and without leave. In the first case he may not recover for injuries received upon the public docks or quays, nor while attempting to board a public boat hired by him to take him to his vessel. Some of the earlier cases required the sailor to have actually returned to the vessel itself, and did not regard as part of the vessel gangways and ladders, though owned and controlled by the ship and provided as a means of access thereto or

¹³ Arising under the Act of 1906, which, unlike the Act of 1897, provided compensation for sailors.

¹⁴ *Jones v. The Alice and Eliza*, 3 B. W. C. C. 495 (C. A., 1910). Here the master of a small schooner went ashore to a public house, in order, among other things, to meet and pay off a laborer who had done some work for the ship. While returning he fell off a public quay to which the boat was moored at a point some distance from it. It was held that he was entitled to compensation. See also *Nelson v. Belfast Corp.*, 42 Ir. L. T. 223, 1 B. W. C. C. 158 (C. A., Ir., 1908), where a laborer on the public roads left his place of work and, in order to get his pay, went to the corporation offices. An injury received, while returning upon the highway, at a point far distant from his place of work was held to arise out of and in the course of his employment. This case is regarded by Judge Ruegg in his work on *Employers' Liability and Workmen's Compensation*, 8 ed., 372, as somewhat doubtful, and it would seem with reason, as, although the laborer was allowed to go for his pay during his working hours, his errand was at best "ancillary to his employment" and was not upon his employer's business.

so used with the knowledge and permission of those in command.¹⁵ Recent cases, however, hold that any means of access provided by the vessel and permitted by those in command to be used for that purpose are a part of the vessel, and that a sailor on his return from shore-leave reenters employment when he has actually reached such means of access.¹⁶ These cases proceed upon the same principles as those which, as has been seen, determine when the employ-

¹⁵ *McDonald v. S. S. Banana*, [1908] 2 K. B. 926, 1 B. W. C. C. 185. Compare with this *Robertson v. Allan Bros. & Co.*, 98 L. T. 821, 1 B. W. C. C. 172 (1908), decided by the same court three months earlier. In the first, where the claimant fell from a gangway leading from the dock to the ship and was drowned, compensation was refused. In the second, the claimant, who was drunk, came on board by way of a cargo skid which, while not the proper or provided means of access to the ship, was habitually so used by the crew. In stepping from the skid to the deck he slipped and tumbled into an unguarded hole in a hatch and was killed. Recovery was allowed. Cozens-Hardy, M. R., who took part in both decisions, can see no inconsistency between the two cases — for in *Robertson's* case the man had got on board the vessel, while "in the *Banana* case the accident happened before he had got on board and although he was very close to the vessel, and on his way back, the result must be the same as if the accident had happened while he was on the road returning to the ship, or on the quay itself." *Moore v. Manchester Liners*, 2 B. W. C. C. 87, 89 (1908).

¹⁶ *Moore v. Manchester Liners*, [1909] 1 K. B. 417, 2 B. W. C. C. 87; [1910] A. C. 498, 3 B. W. C. C. 527. A sailor, if he has not reached the vessel itself, must be using some means of access to the vessel itself, owned or controlled by it and provided by it or permitted by it to be so used. If he is injured at any other point, whether it be a dock or quay or a gangway leading to another ship, which the sailor must cross to reach his own ship, no matter how near he may be to it and though the place where the accident occurs is one over which he must pass to reach it, compensation is denied. This is clearly shown by the two cases of *Kitchenham v. S. S. Johannesburg*, and *Leach v. Oakley, Street & Co.*, argued together, [1911] 1 K. B. 523, 4 B. W. C. C. 91; [1911] A. C. 417, 4 B. W. C. C. 311, in the second of which compensation was granted to the dependents of the deceased who fell off the gangway between his own and another vessel and was drowned; in the first it was denied, the sailor having fallen from the dock before reaching the gangway of his ship. See also *Hewitt v. S. S. Duchess*, [1910] 1 K. B. 772, 3 B. W. C. C. 239 (aff'd in House of Lords, [1911] A. C. 671, 4 B. W. C. C. 317), and *Kelly v. Foam Queen*, 3 B. W. C. C. 113 (1910), in each of which the sailor fell off a public dock while or after hailing a boat to take him to his ship. In *Kelly's* case the boat hailed was a public one; in *Hewitt's* case it was his ship's boat. Had the sailor been injured while being rowed to his ship in a ship's boat it would seem that he would be entitled to recover, since such boat would seem to be as much a means of access to the ship as was the gangway in *Moore's* case. In *Keyser v. Burdick & Co.*, 4 B. W. C. C. 87 (C. A., 1910), compensation was granted to a riveter injured while trying to leave a ship on which he had been working by sliding down a rope hanging from the side of the ship, which was the only means of leaving, the gangway having been removed, and in *Kearon v. Kearon*, 45 Ir. L. T. 96, 4 B. W. C. C. 435 (C. A., Ir., 1911), compensation was given to a sailor who tried to board his vessel on his return from leave by jumping from the dock to the boat some five feet away, there being no gangway or ladder and no attention having been paid to his hail.

ment of a workman entering his employer's premises begins; the vessel is regarded as the place at which the work is to be done, the ladders and gangways which are provided by the vessel and under its control are the equivalent of those parts of the premises provided by the master as an entrance to and exit from the place of work.¹⁷

Where a sailor has left the vessel without leave, he does not reënter the employment until he has actually returned to that part of the vessel where his duties require him to be.¹⁸ If he has been allowed leave, it is his duty to return, and his return is required by his contract of employment, which contemplates undoubtedly a certain amount of shore-leave, and is in the course of his duty under it. On the other hand, if he is absent without leave, his entire excursion is contrary to his duty, and as such is outside the course of the employment, and his return as part of the improper excursion is itself a violation of his duty. A person employed for a definite term of service, as a sailor or a domestic servant, who, having temporarily quitted his employer's services for purposes of his own, in returning adopts a means of access to the vessel or to his master's premises not provided by the master nor permitted by him, can no more recover than could a workman who, instead of using the entrance provided or permitted by the employer, goes to his work by some other way of his own choosing. This is especially true where the means of access selected is unnecessarily dangerous.¹⁹

¹⁷ In the most recent case, *Fletcher Moulton*, L. J., expressed the opinion that it is not necessary that the sailor should actually touch the ship or the means of access thereto provided by the master, but that it is enough if he has taken some specific step towards getting from the quay to the vessel, as if it were shown that in a dense fog he had fallen into the water while trying to find the gangway. So far the cases, whether dealing with the employment of a sailor upon a vessel or a workman employed to do work upon his master's premises, have made the workman's presence upon the employer's premises, or the means of access thereto provided by the master and required or allowed to be used by the servant, the decisive test as to the beginning of the employment; the test may be arbitrary, but it depends solely upon the external facts capable of exact proof. The *dictum* of *Fletcher Moulton* would destroy this test and substitute in place of it one purely subjective to the sailor depending upon what he intended to do and would introduce a multitude of difficult issues.

¹⁸ *Hyndman v. Craig & Co.*, 45 Ir. L. T. 11, 4 B. W. C. C. 438 (1910).

¹⁹ *Martin v. Fullerton & Co.*, [1908] Scot. Sess. Cas. 1030, 1 B. W. C. C. 168 (sailor hurt while attempting to jump from dock to vessel which he had left without leave); *Watson v. Sherwood*, 127 L. T. J. 86, 2 B. W. C. C. 462 (Birmingham Co. Ct., 1909) (club servant having overstayed his leave, hurt while attempting to reënter club through window). In both these cases it would seem that the servants probably selected dan-

Whether the employment be for a long period or whether it be by the day, it is quite evident that a workman cannot be expected to be actually engaged in laboring all the time; there must necessarily be periods of rest; needs of nature must be satisfied. Where the employment is for an extended period, this is the more obviously true; there is no question that a domestic servant or a sailor is in the course of his employment not only while doing his service or standing watch, but also while eating, sleeping, and resting.²⁰ But this is also true, though the employment is one for a limited number of hours. Here, again, the decisive test is that of place; the servant is held to be in the course of employment if, but only if, he is eating, drinking, resting, or otherwise satisfying the wants of nature upon his master's premises or at the place where the master's business is being carried on.²¹ So, where workmen working by the day are required to take their dinner upon the premises, especially where an eating place is provided for them, they are clearly in the course of their employment in so doing, whether they are paid for the time so occupied or not. So, too, where workmen are, during the hours for which they are paid and during which they are required to be upon the premises, satisfying their natural wants and so making themselves physically fit for their labor, or waiting while no work is ready for them.²² But it is not necessary that the workman's

gerous methods of getting back in order to avoid the detection of their unauthorized absence.

²⁰ Since domestic servants and sailors are required to eat, sleep, and rest upon their master's premises or vessel, they are clearly within the course of their employment while so doing. "I have no doubt that the leisure of a sailor on board the vessel is as much in the course of his employment as active work." Fletcher Moulton, L. J., in *Marshall v. S. S. Wild Rose*, [1909] 2 K. B. 46, 49.

²¹ If the servant during his working hours, even with his master's permission, leaves the latter's premises for the purpose of satisfying the wants of nature, the master is not liable, though he has not provided facilities upon his premises for their satisfaction. *Gilbert v. S. S. Nizam*, [1910] 2 K. B. 555, 3 B. W. C. C. 455 (engineer of vessel in dry dock going to his home for dinner); *McKrell v. Howard & Jones*, 2 B. W. C. C. 460 (London Co. Ct., 1909) (solicitor's clerk taking walk in street during lunch hour); *Cogdon v. Gas Co.*, 1 B. W. C. C. 156 (Sunderland Co. Ct., 1907) (plumber going to house of relation for a necessary purpose). But see *Nelson v. Belfast Corp.*, 42 Ir. L. T. 223, 1 B. W. C. C. 158 (C. A., Ir., 1908).

²² *Earnshaw v. Railway*, 115 L. T. J. 89, 5 W. C. C. 28 (Halifax Co. Ct., 1903). See also *Henderson v. Glasgow*, 2 Fraser 1127 (Scot. Ct. Sess., 1900) (a carter injured while waiting for his cart to be emptied by his fellow workmen), and *Keenan v. Flemington Coal Co.*, 5 Fraser 164 (Scot. Ct. Sess., 1903) (miner injured while getting a drink of water).

presence should be required — it is enough that he is permitted by the master to remain upon the premises for this purpose; and so a workman allowed but not required to take dinner upon his master's premises was held to be within the course of employment though no wages were paid during the dinner hour and though he might have taken his dinner where he pleased.²³

But there are two requirements: First, what the servants are doing must be ancillary to the employment, must be a necessary incident of it, the doing of something without which the workman could not properly carry on his work because of physical unfitness, or at least something which is so commonly done by workmen that the doing of it must be in contemplation by the employer when he engages them. Secondly, whether the servant is doing something "ancillary" to his employment or is on his way to or from it, he must not unnecessarily increase the risk of injury to himself and so the risk of liability to his master beyond that contemplated in his contract of employment. He may not choose an unnecessarily dangerous place for the doing of such things, nor may he do them in an unnecessarily dangerous way.²⁴ And so he must not choose a needlessly dangerous path or means of transportation to or from his work. It is not necessary that he is using a place or path provided by his master.²⁵ It is enough that it is customarily used for these purposes by the workmen,²⁶ and that its use is not specifically forbidden.²⁷

²³ *Blovelt v. Sawyer*, [1904] 1 K. B. 271, 6 W. C. C. 16.

²⁴ It is upon this ground that *Marshall v. S. S. Wild Rose*, [1909] 2 K. B. 46, 2 B. W. C. C. 76; [1910] A. C. 486, 3 B. W. C. C. 514, seems to have been decided. The taking of air on a hot night is just as ancillary to an engineer's work as taking food or rest. It, however, appeared from the circumstances that he had probably chosen an unnecessarily dangerous place for the purpose.

²⁵ In *Elliott v. Rex*, *The Times*, Jan. 30, 1904, 6 W. C. C. 27 (*Plymouth Co. Ct.*), the place where the injury was received was one provided by the master.

²⁶ *Gane v. Norton Hill Colliery Co.*, [1909] 2 K. B. 539, 2 B. W. C. C. 42; *McKee v. Great Northern Ry.*, 42 Ir. L. T. 132, 1 B. W. C. C. 165 (C. A., Ir., 1908), where it seems to be held that a general order that the servants are not to use a short cut is immaterial, if the employer knew that a large number of workmen were in the habit of using it.

²⁷ In *Barnes v. The Nunnery Coal Company*, [1910] W. N. 248, 4 B. W. C. C. 43, it was held, *Fletcher Moulton, L. J.*, dissenting, that a boy who chose a dangerous and forbidden method of getting to his working place could not recover. *Acc. Kane v. Merry & Cunningham*, 48 Scot. L. Rep. 430, 4 B. W. C. C. 379 (Ct. Sess., 1911). *Cf. McKee v. Great Northern Ry.*, *supra*. In these cases the dangerous way was selected to save the workman trouble.

But he must not choose a place²⁸ or path,²⁹ however convenient to him, which involves dangers greater in extent or different in kind from those incidental to the place or path provided or permitted.

In every case in which a workman, injured while coming or going to work or while engaged in doing something "ancillary" to his employment, has been given compensation, the injury has been in whole or in part one due to the nature or condition of the premises or vessel, or to some operation of the employer's business thereon, — in a word, because of some danger incident and peculiar to the place where he is required or entitled by virtue of his contract of employment to be for these purposes.³⁰ In no case has recovery

²⁸ *Brice v. Lloyd, Ltd.*, [1909] 2 K. B. 804, 2 B. W. C. C. 26. A workman for the sake of warmth took his supper on top of a tank full of boiling water. "Employment," says Farwell, L. J., "extends to all things which a workman is entitled by the contract of employment expressly or impliedly to do. Thus he is entitled to pass to and from the premises" [place of work?] "and to take his meals on the premises; but he is not entitled, and therefore he is not employed, to do things which are unreasonable or things which are expressly forbidden." So in *Thompson v. Flemington Coal Co.*, 48 Scot. L. Rep. 740 (Ct. Sess., 1911), it was held that the injury to a workman received while going for a necessary occasion into a small space under an engine did not arise out of his employment. *Rose v. Morrison & Mason*, 105 L. T. 2, 4 B. W. C. C. 277 (C. A., 1911). Compare with the Thompson case, *Lawless v. Wigan Coal Co.*, 124 L. T. J. 532, 1 B. W. C. C. 153 (Wigan Co. Ct., 1908). In each case the place of convenience was some distance away; in each case the occasion was urgent, though in Lawless's case the place used was one customarily used by workmen in similar emergencies. In none of these cases was the use of the place specifically forbidden. See also *Edmunds v. S. S. Peterston*, 132 L. T. J. 6 (C. A., Oct., 1911).

²⁹ *McLaren v. Caledonian Ry.*, 48 Scot. L. Rep. 885 (Ct. Sess., 1911) (a railway employee taking a short cut home along the tracks); *Hendry v. United Collieries Co.*, [1910] Scot. Sess. Cas. 709, 3 B. W. C. C. 567 (workman injured while leaving pit by path neither sanctioned nor expressly prohibited but obviously involving considerable danger); *Pope v. Hill's Plymouth Co.*, 102 L. T., 633, 3 B. W. C. C. 339 (C. A., 1910) (boy attempting to climb moving trucks to steal a ride home, a practice obviously dangerous but not specifically forbidden); *Morrison v. Clyde Nav. Trustees*, [1909] Scot. Sess. Cas. 59, 2 B. W. C. C. 99 (similar facts). In all these cases the dangerous path or means of transportation was chosen to save the workman exertion.

³⁰ Farwell, L. J., in *Gilbert v. S. S. Nizam*, [1910] 2 K. B. 555, 558, 3 B. W. C. C. 455: "The man who is crushed by a falling wall on his employer's premises while he is eating his dinner recovers compensation because he is entitled to be on the spot by virtue of his contract of employment." "If he [he is speaking of a workman in a deep slate quarry] has to use some perilous means of access [or is required or permitted to satisfy his natural wants in a dangerous place], the dangers which he runs in such use are to my mind incident to his employment just the same as those he runs while actually working. It is by reason of the employment that he becomes subject to those risks." *Fletcher Moulton, L. J.*, in *Moore v. Manchester Liners*, [1909] 1 K. B. 417, 2 W. C. C. 87, 97.

been allowed where the sole cause of the injury is the manner in which the servant is coming or going, eating, drinking, or resting, — as where a servant chokes himself while at his dinner.³¹

Granting that the servant has entered the employment of his master and has not definitely quitted it, the question arises as to whether he departs from it by doing work other than that which he is engaged to perform, or by doing his appointed work at a place other than that designated for that purpose or in a manner in which he has not been directed or permitted by the master to perform it.

"There are two ways," says the Lord President in *Conway v. Pumpherson Oil Company*,³² "in which a servant may be without the sphere of his employment. One way — and in these cases the question is generally of easy solution — is where the servant does some other sort of work than that for which he is engaged. To take a very simple and obvious instance, — if the footman on the box of a carriage, with the consent of the coachman, took it into his head to drive his horses, there would be no question that if any accident happened it would not be in the course of his employment, for it is not part of a footman's business to drive, although it is part of his business to sit on the box. The other class of cases which raise more difficult questions is where a servant goes into what I think I may call a territory with which he has nothing to do."

An examination of the cases shows that even the first question is not a simple one. The phrase used is "in the course of his employment." On its face this seems to indicate that the accident must happen to a servant while he is engaged upon that part of the employer's general business which has been specifically entrusted to the particular servant. And this is the construction which the British courts have put upon it. The right of the master to regulate his own business and to assign specific tasks to specific workmen is fully recognized,³³ and the risk of liability which is placed upon him by the act is limited to those accidents which occur to workmen who confine themselves to the general boundaries of their allotted spheres of action.³⁴ But the workman is not rigidly re-

³¹ O'Connor, J., in *Cogdon v. Sunderland Gas Co.*, 1 B. W. C. C. 156 (1907).

³² [1911] Scot. Sess. Cas. 660, 48 Scot. L. Rep. 632, 635, 4 B. W. C. C. 392.

³³ "It is and must be competent for a master to define and limit what that sphere of employment is." Collins, L. J., in *Whitehead v. Reader*, [1901] 2 K. B. 48, 3 W. C. C. 40, 43.

³⁴ *Lowe v. Pearson*, [1899] 1 Q. B. 261, 1 W. C. C. 5; *Losh v. Evans*, 19 T. L. R.

stricted to the exact acts which he is employed to do. Unless the servant undertakes work of a generically different kind and involving new and greater risks, a "reasonable latitude" is allowed to him in choosing his means of accomplishing his task. The test at best is a vague one, depending on the circumstances of each individual case, and must in practice give rise to uncertainties and litigation.³⁵

Where "the work is divided into certain spheres and one man steps out of his class and undertakes to do work for which he is not fit and which is not entrusted to him,"³⁶ and is injured, his injury is not received in the course of his employment. Compensation has from the first been consistently denied where a workman employed to do unskilled labor officiously attempts, save in an emergency, to do work requiring skill and experience for its safe performance, as where one whose work does not involve contact with machinery officiously meddles with it. The spheres of skilled and unskilled labor are regarded as quite distinct and separate.³⁷ But a skilled workman is not so rigidly confined to the precise sort of skilled work which he is specifically employed to perform, and so too an unskilled workman is probably not strictly confined to the exact form of unskilled labor entrusted to him — at least if the work voluntarily chosen does not involve risks substantially greater and different in kind. A reasonable latitude is allowed him in his choice of the means of accomplishing his task. He may do things which are not specifically entrusted to him and which are specifically entrusted to

142, 5 W. C. C. 17 (C. A., 1903); *Edwards v. International Coal Co.*, 5 W. C. C. 21 (C. A., 1899).

³⁵ If the object of the acts is to throw upon the business the cost of the injury which it does to those engaged therein, it would seem that a servant should be compensated for injuries received while doing work which in fact tends to further the general objects of the business, or which if successful would further them, irrespective of whether such work is specifically entrusted to him or not. It would seem better, therefore, to omit the words "in the course of employment" and to substitute some phrase which would make the business answerable for all damage which was received by those employed therein while engaged in work which in fact tended to further the general objects thereof.

³⁶ *Lord Kinnear v. Goslan v. Gillies*, [1907] Scot. Sess. Cas. 68, 44 Scot. L. Rep. 71, 73.

³⁷ In *Lowe v. Pearson*, *Losh v. Evans*, and *Edwards v. International Coal Co.*, *supra*, unskilled workmen were injured while attempting tasks requiring skill and experience for their safe performance. In *Losh v. Evans*, Collins, M. R., says, 5 W. C. C. 19-20: "It seemed to be clear that an employer was at liberty to . . . divide the labor of his workmen into unintelligent and skilled labor." See also *Kerr v. Baird & Co.*, 48 Scot. L. Rep. 646 (Ct. Sess., 1911) (ordinary miner officiously firing shot or blast).

another employee, if they are reasonably necessary to enable him to perform his appointed task. Unless by officiously doing work for which he has not the requisite skill and experience the workman unduly increases the risk of injury to himself, or, perhaps, unless he is expressly forbidden to do it,³⁸ "it is enough that he has interposed in the furtherance of his master's business."³⁹ "Any accident resulting to a workman while engaged in promoting his employer's interests is *prima facie*" within the act.⁴⁰

The Scottish cases indicate that a servant, "besides having to perform special work, owes something to the community of his

³⁸ While the fact that a particular work officiously undertaken is expressly forbidden does not of itself take it out of the course of employment, *Whitehead v. Reader*, [1901] 2 K. B. 48, 3 W. C. C. 40 (where the injury to a workman employed to grind tools caused by his attempt to adjust the power belt on his machinery was held to arise out of and in the course of his employment though he had been expressly told not to touch the machinery), there is, especially in the later cases, a distinct tendency to regard disobedience as an important factor not only where the servant has done work not specifically entrusted to him, but also where he is doing his appointed work in an improper manner, or is going to or from his work at his employer's premises, or otherwise doing things ancillary to his employment. So, *Farwell, L. J.*, in *Brice v. Lloyd, Ltd.*, [1909] 2 K. B. 804, 2 B. W. C. C. 26, says: "a workman is not entitled to do things which are expressly forbidden." And in *Kane v. Merry & Cunninghame*, 48 Scot. L. Rep. 430, 4 B. W. C. C. 379 (Ct. Sess., 1911), and in *Barnes v. Nunnery Coal Co.*, [1910] W. N. 248, 4 B. W. C. C. 42 (C. A., 1910), *ante*, n. 27, the fact that the way which the servant chooses to take to or from his work is prohibited seems to be regarded as of great importance. In the Irish cases a distinction seems to be drawn between a failure to observe a mere understanding or general order, *McKee v. Great Northern Ry.*, 42 Ir. L. T. 132, 1 B. W. C. C. 165 (C. A., Ir., 1908), *ante*, n. 26; or the breach of a general regulation, *Tobin v. Hearn*, [1910] 2 I. R. 639, *infra*, n. 39, and disobedience of as specific prohibition.

³⁹ Lord Pearson in *Goslan v. Gillies*, [1907] Scot. Sess. Cas. 68, 44 Scot. L. Rep. 71, where a clerk, a part of whose duties it was to weigh all the articles sent out, was injured while assisting some laborers to carry a brass frame to the weighing machine. See also *Tobin v. Hearn*, [1910] 2 I. R. 639, where a boy employed at a finishing machine in a boot factory was sent to have a sole remoulded. The operator in charge of the moulding machine being absent, the boy, though by the regulations the workmen were forbidden to change from one machine to another, attempted to remould it himself and was injured. A finding by the County Court that his injury did not arise out of and in the course of employment was held to be without evidence to support it, *Samuel Walker, L. C.*, saying: "In trying to do the work himself he was acting under the mistaken idea that he was furthering his master's interests." It was also said that the "boy was accustomed on machinery though of a different sort." A distinction is also drawn between "a breach of general regulations" and "wilful interference with dangerous machinery and disobedience of orders."

⁴⁰ Lord McLaren in *Menzies v. McQuibban*, 2 Fraser 732, 735 (Scot. Ct. Sess., 1900), where an injury, received by a general laborer while assisting a machine man at his request to replace a belt, was held to be within the Act of 1897.

fellow workers, and must be helpful according to his experience when the necessity arises.”⁴¹ The test is whether “the master or overseer might reasonably have required him to perform” the act in question though outside of his usual sphere of work.⁴²

A workman is still in the course of his employment though he is in an emergency doing acts which are entirely different from the work assigned him, which involve new and greater danger and which he is expressly forbidden to do under normal conditions. Such an emergency only exists where the master's interests are imperilled, and the servant's acts must be necessary for their protection. He may do such acts if they are necessary to preserve the master's property from destruction,⁴³ or to rescue a fellow workman, if such workman was imperilled under circumstances which would make the master liable to compensate him, if injured, for in such case the act is one which, if successful, would have preserved the master from liability or have lessened the amount thereof.⁴⁴ If, however, the servant or other person imperilled be not entitled to compensation if injured, the rescue has no tendency to protect the master's interest, and the servant's injury, received in attempting it, does not arise in the course of the employment.⁴⁵

⁴¹ Lord McLaren in *Menzies v. McQuibban*, *supra*.

⁴² Lord McLaren in *Goslan v. Gillies*, *supra*.

⁴³ *Rees v. Thomas*, [1899] 1 Q. B. 1015, 1 W. C. C. 9 (a mine boy held to be within the course of his employment while attempting to stop a runaway horse, though his employment had nothing to do with horses and he had got on the truck which the runaway horse was drawing contrary to orders and to steal a ride); *Harrison v. Whitaker Bros.*, 16 T. L. R. 108, 2 W. C. C. 12 (C. A., 1900). But in *Collins v. Collins*, [1907] 2 I. R. 104, it is held an injury received by a servant while trying to save his master's life or protect him from physical injury is not within the act.

⁴⁴ *Mathews v. Bedworth*, 106 L. T. J. 485, 1 W. C. C. 124 (Nuneaton Co. Ct., 1899); *London & Edinburgh Shipping Co. v. Brown*, 7 Fraser 488 (Scot. Sess. Cas., 1905); and see the curious case of *Yates v. Colliery Co.*, [1910] 2 K. B. 538, 3 B. W. C. C. 418, where a collier, while assisting in removing a shockingly injured fellow miner, received a nervous shock so severe as to produce neurasthenia. See also *Hapelman v. Poole*, 25 T. L. R. 155, 2 B. W. C. C. 48 (dependents of an employee of a lion tamer, whose duties did not require him to come in contact with the lions, held entitled to compensation for his death while attempting to drive escaped lions back to their cage).

⁴⁵ *Mullen v. Stewart*, [1908] Scot. Sess. Cas. 91, 1 B. W. C. C. 204. In *Powell v. Lanarkshire Steel Co.*, 6 Fraser 103 (Scot. Ct. Sess., 1904), it was held that a servant injured while endeavoring to save property which had been imperilled by his own acts done outside his sphere of employment and in disobedience of orders, was not entitled to compensation. But see *Hapelman v. Poole*, *supra*. So a servant, doing another's

It is evident that very difficult questions must arise as to whether an emergency in fact exists, what interests of the master are sufficiently important to make it the servant's duty or right to leave his appointed sphere of work to protect them, and whether the acts done were necessary or were merely officious or over-zealous. The first question is rendered especially uncertain by the fact that it is enough that the servant honestly believes that an emergency exists in which his master's interest requires him to go outside his normal sphere of employment; no such emergency need actually exist, nor need the master's person or property or interests be in actual peril.⁴⁶ Indeed it seems immaterial that there were no reasonable grounds for the workman's belief in its existence. The uncertainty, the opportunity for litigation created by making the right to recover depend on the claimant's state of mind, is obvious.

As to the second question, it seems impossible to draw any definite boundary not wholly arbitrary between interests of the master sufficiently important to justify the servant in departing from his normal sphere of labor and those which are not of sufficient importance to warrant his so doing. In every case save those covered by actual decisions, the question must be solved by a comparison of the benefit to the master and the added risk of injury to the servant and so of liability to the master. The Scottish cases show a tendency to regard as an emergency any situation when, because no one specially appointed is present to do the work in question, the master's business will be delayed or impeded unless someone, in whose sphere of duty such acts are not included, should perform them.⁴⁷ This is, however, limited to cases where the new work does not require skill which the servant doing it does not possess, or where the servant is not forbidden to do such work, but, on the contrary,

work to oblige him, is not within the course of his employment. *McAllan v. Perthshire County Council*, 8 Fraser 783 (Scot. Ct. Sess., 1906).

⁴⁶ *Harrison v. Whittaker Bros.*, 16 T. L. R. 108, 2 W. C. C. 12 (C. A., 1900). Here a boy employed to grease the wheels of trucks used upon his employer's private railway, while waiting for trucks to grease, went to warm himself at a fire near to the lever of a switch. He saw a train approaching and, thinking the switch closed, pulled the lever to open it, and in so doing was injured. In fact the switch operated automatically and the engine would have opened it. It was held that the boy's story being believed, there was sufficient evidence to justify the County Court in holding that the injury arose out of and in the course of the boy's employment.

⁴⁷ The same idea appears in the recent Irish case of *Tobin v. Hearn*, [1910] 2 I. R. 639, *ante*, n. 39.

might be called upon to do it, though in fact no such demand is made upon him by one authorized to make it.⁴⁸

Again, even granting the existence of an emergency, it may be a grave question as to whether the servant's act was necessary. In the early cases of *Low v. Pearson*⁴⁹ and *Losh v. Evans*⁵⁰ it would appear that the act of the unskilled servant in meddling with the machinery was wholly officious. There was no necessity for the claimant in *Low v. Pearson*, a boy employed to make balls of clay, to clean the machine. While he probably intended to be helpful, his aid was not required. In *Losh v. Evans* the girl who tried to start the machinery was taking a risk entirely out of proportion to the time which she would, if successful, have saved. Nor in either case was the act done in response to a request for help from those who were doing the work as part of their regular duties, as in *Menzies v. McQuibban* and *Goslan v. Gillies*, which may well be an important factor.

Another important question is how far a servant is entitled to go outside his appointed sphere in obedience to the orders of a superior. Of course, if such superior has the power to fix the spheres of labor for the workman, a workman, by obeying them, merely passes into a new "course of employment"; but even if he has not, it seems that the servant is justified if he honestly believe that such superior is authorized to employ him.⁵¹ Honesty of the claimant's belief is, as in *Harrison v. Whittaker Bros.*,⁵² the test of his right to compensation, and the same uncertainty, the same incentive to fraudulent claims and defenses designed to tire out the claimant is created. Yet if, as seems to be the case, the question of the servant's right to do work different from that which he is employed to do depends upon whether it is to the master's interest that he should do so, it

⁴⁸ As in *Menzies v. McQuibban*, 2 Fraser 732 (Scot. Ct. Sess., 1910). This in addition tends to show that, while the workman was not strictly within the line of his duty on this particular occasion, it was not outside the class of work for which the master believed him fitted, and therefore was willing to assume the risk of compensating him if injured while doing it.

⁴⁹ [1899] 1 Q. B. 261, 1 W. C. C. 5.

⁵⁰ 19 T. L. R. 142, 5 W. C. C. 17 (C. A., 1903).

⁵¹ *Brown v. Scott*, The Times, June 12, 1899, 1 W. C. C. 11 (C. A.), where, however, the injured boy was a general helper, "a jack-of-all-trades." See also *Menzies v. McQuibban*, *supra*. But see *Edwards v. International Coal Co.*, The Times, Nov. 13, 1899, 5 W. C. C. 21 (C. A.).

⁵² 16 T. L. R. 108, 2 W. C. C. 12 (C. A., 1900), *ante*, n. 46.

would appear that on the whole it is better to risk an occasional additional liability rather than that all discipline should be destroyed by requiring the servant to demand proof of his superior's right to give an order before obeying it, and there is much to be said in favor of the view expressed in *Statham v. Galloway*⁵³ that discipline requires a servant to obey orders of a superior though he knows they are unauthorized; indeed the workman has usually no actual choice, save that between obedience and immediate or future dismissal.

Two conceptions dominate the decisions. One is that it is the master's right to manage the business as he pleases, and not to be subject to any risk of liability other than that incident to his business as he has divided it. The other is that the strict requirements are relaxed when it is to the master's interest that they be relaxed. Compensation is for good servants who remain where they are put, or who only stray therefrom when they can more effectively serve their master by so doing. They may not add new risks not capable of being foreseen by their master when he engages them and designates their field of labor, unless by so doing they will probably save him from enough harm to compensate him for the added risks. The servant must serve in the master's way, as he is directed, or, in emergencies, as he has reason to believe the master would approve were he present, or as he, as a faithful servant owing to his master fealty and aid in time of peril, ought. There is no compensation for the servant "who can behave but won't," or who sets up his own will against his master's as to how the business can best be served.

The same general principles seem to apply where the workman has gone into "a territory with which he has nothing to do," and does his appointed work at some other place than that designated by the master or which is expressly prohibited by him. The one place may be so far distant, so entirely distinct from the other, that work, done at the one place, though otherwise of the same general nature as that done at the other, may well be regarded as a substantially different kind of employment, so that the choice of the place not designated may of itself put the servant outside the

⁵³ 109 L. T. J. 133, 2 W. C. C. 149 (Manchester Co. Ct., 1900). The whole opinion of Judge Parry is very interesting and suggestive. Compare with it *McNicholas v. Dawson*, 15 T. L. R. 242, 1 W. C. C. 80 (C. A., 1899).

course of his employment. As the master is answerable for injuries due to the nature and condition of the place of work, it is evident that an unauthorized change in the *locus* of the work does materially alter, without the master's consent, the risk of injury to the workman and so, if compensation were allowed, the risk of liability to the master.⁵⁴

A servant also places himself outside of his employment if during his working hours and while upon his master's premises, and at the very scene of his appointed labors, he devote a part of that time, whether that during which he should be actually engaged upon his master's work or that during which he is left at leisure, to acts the sole object of which is to further some purely private object of his own, and which are neither appropriate nor intended to further his master's business, nor, like eating or resting, necessarily incident to any long-continued employment. Such acts have no relation to his employment save that they are done during his working hours or upon his employer's premises, or with his employer's tools or appliances. He ceases to serve his master, and becomes as it were his own servant, and is regarded as having completely quitted his employment for the time being as though he left his master's premises upon a private errand of his own.⁵⁵ And it seems to be

⁵⁴ See the instance given by Buckley, L. J., in *Harding v. Brynddu Colliery Co.*, [1911] 2 K. B. 747, 751, 4 B. W. C. C. 269, of a quarryman employed to quarry stone in quarry A., who goes to another quarry owned by his employer and is injured while working there. No actual case of this sort has been decided. On principle it would seem that if the second quarry was no more dangerous than the other and the workman's services were actually of use to the employer there, the servant should recover, especially if he had honestly misunderstood the directions of his master.

⁵⁵ *Smith v. Lancashire & Yorkshire Ry.*, [1899] 1 Q. B. 141, 1 W. C. C. 1 (in which a railway porter got on the footboard of a moving train to speak to a friend and was there injured); *Reed v. Great Western Ry.*, [1909] A. C. 31, 2 B. W. C. C. 109 (engine driver crossing tracks on his return from visit to another driver to whom he had returned a book); *Williams v. Wigan Coal and Iron Co.*, 3 B. W. C. C. 65 (C. A., 1909) (engine driver boarding slowly moving engine to give another driver wages paid by mistake to the claimant); *Hendry v. Caledonian R. Co.*, [1907] Scot. Sess. Cas. 732, 44 Scot. L. Rep. 584 (fish porter going over railroad tracks to inquire how many fish trucks were expected); *Callaghan v. Maxwell*, 2 Fraser 420 (Scot. Ct. Sess., 1900) (girl leaving her place to speak to a fellow workgirl. She had been forbidden to leave and the danger of so doing had been pointed out to her); and see the recent case of *Curtis v. Talbot* (C. A., Oct., 1911), briefly reported, in 131 L. T. J. 552 (surgeon volunteering as subject of scientific experiment). In the *Hendry* case an effort is made to distinguish *Goodlet v. Caledonian R. Co.*, 4 Fraser 986 (Scot. Ct. Sess., 1902), where an engineer, who, having occasion to cross certain tracks to perform one of his duties, went further and crossed other tracks to speak to a fellow workman, and was struck by a train while

immaterial whether he is by so doing wrongfully converting his master's time to his own use, as where his work demands all of his time, or whether the master expressly permits or tacitly tolerates his servant devoting part of his working hours to his own purposes.

In the early cases the courts regard the "course of employment" as the important factor. In the later cases, on the contrary, the principal inquiry is whether the injury arose "out of" the employment. The same circumstances which in the early cases are held to take an injury out of the course of employment, the later cases regard as showing that it did not arise thereout.⁵⁶ A workman by officiously doing work or choosing a working place generically different from that assigned him by his master, or who has devoted part of his working time to his personal interests, is held in the later cases not to have put himself outside "the course of his employment," but to have created new risks not incidental to his employment nor within the contract of employment made with the master, so that his injury does not arise "out of" his employment.

Though the work officiously undertaken is not so generically different from, or the place selected so foreign to, that designated by the master that the servant is *ipso facto* put outside the course of his employment, and though the workman's object is not so personal that in pursuing it he temporarily quits his employment, yet the combination of these two elements, — deviation and self-interest, — neither by itself sufficient to take the injury out of the

returning and before he got back to the tracks where his duties lay, was held entitled to compensation, on the ground that the fish porter's work did not require him, like that of an engine driver, to cross tracks nor subject him to the risk of being run down by trains. In view of the decision in the House of Lords in *Reed v. Great Western Ry.*, *supra*, where the plaintiff, an engine driver, was run down under very similar circumstances, this distinction seems unsound. It seems to be immaterial that the sufferer was normally subjected to similar risks in the course of doing his appointed work, if in fact the particular risk which injures him was one to which his regular labor would not on the particular occasion have subjected him.

⁵⁶ Even in the earlier cases there are distinct intimations that the liability imposed upon the master by the act is to be confined to those risks which at the time he employs the workman he could contemplate such workman would run. And, at least since the case of *Challis v. London & South Western Ry.*, [1905] 2 K. B. 154, 7 W. C. C. 23, it has been consistently held that only those injuries arise out of the employment which result from risks commonly incidental thereto, that is, risks to which the employer when he engaged the workman and assigned him his duties does or ought to contemplate that the workman will be exposed in consequence of his employment upon the particular work assigned to him.

course of employment or prevent it from arising thereout, is held in the earlier cases to do the first and in the later cases the last. If the servant is injured in doing work other than that specifically assigned to him, though not generically different therefrom, his object in doing it is decisive of his right to compensation.⁵⁷ And, as has been seen, he may in cases of emergency do things utterly different in kind from those he is employed to do and which are normally forbidden. And where the workman is working at some unpermitted or prohibited place on the premises where his work ought to be done, though there is no such complete departure from the designated place of work as *ipso facto* to place him outside his employment, the test applied to determine the right to compensation is whether the servant has gone to the unpermitted premises for his own purposes or for the purpose of accomplishing the work entrusted to him, and whether he has thereby substantially increased the risks incident to his employment.⁵⁸ This is well

⁵⁷ In *Whitehead v. Reader*, [1901] 2 K. B. 48, 3 W. C. C. 40, *ante*, n. 38, great stress is laid on the fact that the claimant, an operative, injured while adjusting the belt of his machine, was "not officiously or for his own purposes meddling with that machinery." So in *Goslan v. Gillies and Menzies v. McQuibban*, *supra*, when the servant was allowed compensation, his sole object was to further his master's interests. Compare *Tobin v. Hearn*, [1910] 2 I. R. 639, *ante*, n. 39, with *Cronin v. Silver*, 4 B. W. C. C. 221 (C. A., 1911). In each case the claimant was injured by a machine other than that he or she was employed to operate. In the first case compensation was awarded since the claimant was "not actuated by mischief or meddlesome curiosity," in which case he could clearly not have recovered, *Furniss v. Gartside*, 4 B. W. C. C. 411 (C. A., 1911), but "was acting under the mistaken idea that he was furthering his master's interests." In the second case compensation was denied because her injury "was proved to have been occasioned by her either working or meddling with a machine with which she had no business to meddle and as to which it was a mere guess that it could be in any way connected with her employment." See also *Whelan v. Moore*, 43 Ir. L. T. 205, 2 B. W. C. C. 114 (C. A., Ir., 1909), where, against the express orders of their employer, the crew of a canal changed places by an arrangement among themselves and the driver in steering the boat fell into the canal and was drowned. See, however, *Cambrook v. George*, 114 L. T. J. 550, 5 W. C. C. 26 (*Bridgend Co. Ct.*, 1903), in which case, however, it appeared that it was customary to change places and that the master's representative had been present while the servants were so working and had made no objection. So, while he testified he knew nothing of the change and would not have permitted it if he had known, the servants had reason honestly to believe that the change was at least tolerated.

⁵⁸ In *Harding v. Brynddu Colliery Co.*, [1911] 2 K. B. 747, 4 B. W. C. C. 269, *ante*, n. 54, Buckley, L. J., expresses the opinion that the workman's object in going to a prohibited place of work was immaterial. The master's prohibition so "fenced off" such place from "the area in which the employment was to take place" that it was "altogether outside the area of his employment." While regarding the servant's

shown by four recent cases, all decided within a few months of one another. In *Conway v. Pumpherston Oil Co.*⁵⁹ and in *Harding v. Brynddu Colliery Co.*⁶⁰ an injury was held to have been received in the course of the workman's employment because the workman, though injured at a point where he was specifically prohibited to go, had gone there for the purpose of accomplishing the work he was employed to do, in the first case to get a tool necessary for his labor, and in the latter to see why a drill which he was operating was working badly. In *Traynor v. Addie*⁶¹ and *Weighill v. South Benton Colliery Co.*⁶² the same courts held that a workman who had gone to a prohibited place which he knew to be dangerous was outside the course of his employment, since he went there not to accomplish any specific work entrusted to him. In the first case it was not shown what led the miner to go to the prohibited and dangerous place; in the second, a miner who was paid by the amount of coal mined chose to work at a dangerous place because the coal was soft and could be mined more easily and quickly than a harder coal at the proper and safer place.

From the first it has been said that disobedience of orders does not of itself terminate the employment nor place the servant outside of it unless he has in disobedience of orders done work entirely different, in kind and in the risks involved, from that entrusted to him, or has done his work at a place altogether foreign to that designated by his employer.⁶³ And it is generally held that an injury resulting from a workman's negligence in carrying out his appointed

object in going into a prohibited place as immaterial, he regards the purpose of the prohibition as important. If a certain place is designated because the work can be more efficiently done there, as where porters in a factory are required to carry goods by certain definite routes, and not to secure the safety of the servant, disobedience will not put the servant out of the course of his employment. He will simply be doing it in a forbidden way.

⁵⁹ 48 Scot. L. Rep. 632, 4 B. W. C. C. 392 (Ct. Sess., 1911).

⁶⁰ [1911], 2 K. B. 747, 4 B. W. C. C. 269.

⁶¹ 48 Scot. L. Rep. 820, 4 B. W. C. C. 357 (1910).

⁶² [1911], 2 K. B. 757, n. (C. A., 1911).

⁶³ "If a workman acting within that sphere" (the sphere of his employment as limited by his master) "violates an order of the master, the master may well be responsible. But if the workman travels out of the sphere, as limited by the master, and acts in violation of the master's orders, or if the breach of the master's orders involves the workman's travelling outside the sphere of his limited employment, I do not think that the master would be liable for the consequences of the workman's acts either to the workman or to third parties." Collins, L. J., in *Whitehead v. Reader*, 3 W. C. C. 40, 43.

task, disobedience of orders, or even his choice of an unnecessarily dangerous method of performing his work, may, none the less, arise out of his employment.⁶⁴

But the line between the doing of prohibited work or the doing of permitted work in a prohibited place on the one hand, and on the other the doing of permitted work in a permitted place but in an improper or prohibited manner, is a very narrow and indefinite one.

Even in cases where there is no new work officially undertaken, no place other than that designated by the master selected as a working place, but where under any reasonable view of the facts the servant has merely chosen an unnecessarily dangerous method of performing his allotted work, there is a marked tendency to make the workman's right to compensation depend upon his motive in doing his work in the particular way in which he has done it. Just as a deviation from the appointed sphere or scene of labor, though not so complete as of itself to terminate the employment, is held to prevent the injury resulting from arising out of it, if the workman so deviates solely for his own purposes, so here, if the servant selects an improper method of work for some private purpose of his own, the later cases tend to hold that the resulting injury does not arise out of his employment.

This tendency is especially exhibited in recent Scottish and Irish cases. In *Revie v. Cummings*,⁶⁵ a member of a gang of men who were employed in hauling heavy goods by a traction engine, and whose duty it was to apply the brakes when necessary, was injured under the following circumstances: Instead of walking by the truck, in order to save himself labor he rode upon one of the trucks; it being necessary to apply the brakes, he jumped down, and in so doing he stumbled and fell beneath the wheels. It was held that

⁶⁴ "I do not," says Fletcher Moulton, L. J., in *Astley v. Evans & Co.*, [1911] 1 K. B. 1036, 1043, "think for one moment that the Act intended to provide only for those accidents which arose during or out of the proper performance by the workman of his contract of service." And later in the same case he says, p. 1044: "Negligence is no answer to the claim of the dependents, even disobedience is no answer; but if the man had ceased to be engaged in the master's work when the accident happened, then it would not or might not be in the course of his employment, and if the accident was not connected with the dangers to which he was exposed, but to dangers voluntarily sought by him, it might, even though it happened 'in the course of,' not arise 'out of,' the employment."

⁶⁵ 48 Scot. L. Rep. 831 (Ct. Sess., 1911).

his injury did not arise out of the employment, since it was not caused by any risk necessitated by his duties, but from a risk which he himself had added by voluntarily choosing for his own convenience to ride rather than walk.

In *Clifford v. Joy*,⁶⁶ a servant girl who had just washed her hair was called to the kitchen to take care of a baby in its cradle. Her hair still being wet, she sat for the purpose of drying it at the side of the cradle nearest the fire. The loose sleeve of her dress caught fire and she was burned. It was held that her injury did not arise out of her employment, since she had chosen, because of something which it was not her duty to do, a place more dangerous than one, which, but for this private purpose, would have been as convenient for the performance of her service as nurse girl. The risk was one which arose not by reason of her employment, but solely because she had for her private purposes adopted this dangerous method of doing it.

To this principle also can be referred the case of *McDaid v. Steel*,⁶⁷ where compensation was refused an errand boy who, in taking fish to a customer, used the elevator in the customer's house in order to save himself the trouble of walking upstairs, and thereby exposed himself for his own purposes to new risks not a necessary incident to his employment and not within the contract of employment which he had made with the master.

In none of these cases was there a complete departure from the appointed work; on the contrary, what the servant was doing was appropriate and designed to accomplish the very piece of work entrusted to him. Nor had he arbitrarily chosen a scene of labor distinct from that designated by his master. In each case he was, when injured, at the general scene of his appointed work; in no case was the servant devoting a part of his time to doing something which had no relation to the work entrusted to him, but was solely for his own convenience. On the contrary, he was laboring to perform his appointed task, though the particular means was adopted because it was also appropriate to further his own purposes. While the servant would not have been injured had he not selected this particular means of doing his work, and though his injury is due to his desire to further his own private interests, it is equally clear that

⁶⁶ 43 Ir. L. T. 193, 2 B. W. C. C. 32 (C. A., Ir., 1909).

⁶⁷ 48 Scot. L. Rep. 765 (Ct. Sess., 1911).

he would not have been injured had he not been endeavoring to accomplish the work entrusted to him, and so his injury is also due to his efforts to serve his master.

The nurse girl in *Clifford v. Joy* would not have been burned in minding the baby had she not while doing so sat near the fire in order to dry her hair; but she was not burned solely because she was drying her hair. Had she not had to mind the baby, she would have continued drying her hair in the open air. She was burned because she was trying to accomplish two things at once, — to perform her duties as nurse-maid and at the same time to dry her hair. So neither the brakeman nor the errand boy in *Revie v. Cummings* and *McDaid v. Steel* were riding on the truck or the elevator simply for his own amusement. While the one might have performed his duties as brakeman and the other could have delivered his goods without so doing, it is quite certain that the only private purpose which they had — to do their master's work with the least possible exertion — had relation to their work and grew out of it.

In all of these cases the method which they chose, while it made the work more dangerous to them, did not make it less efficient to accomplish the object of their employment. In fact, in *McDaid's* case it actually tended to expedite the performance of the master's business as well as to save the errand boy exertion. In all of these cases the workman was doing his appointed work at its permitted scene, and compensation was denied him solely because he chose for his own convenience and to save himself trouble, or for some other purpose of his own, a method of doing the work which increased the risks normally incident to it. Here, as well as in those cases where there is a deviation from the sphere of employment not so complete as *ipso facto* to terminate it, the workman's object is decisive. What, then, is regarded as a private purpose of the workman, and to what extent must his object be to serve it? It is not necessary that his object be personal gain. An injury arising from a deviation or from a dangerous method chosen by a servant to oblige a friend would not arise out of the employment. It is enough that he has any definite end in view other than the accomplishment of the work entrusted to him by his master.

In determining whether the workman is dominated by self-interest, by a desire to accomplish his own purposes, the immediate object of his choice of work or place or manner of working is deci-

sive. If his immediate object be to facilitate the work entrusted to him, he is not barred because there is a chance of incidental benefit to himself. A workman's desire to obtain such benefit as will follow work well done is not a "private purpose of his own." On the other hand, if his object be to save himself trouble or to increase his earnings, or to accomplish a private end while doing his employer's work, the mere fact that the master's work would thereby be more rapidly or efficiently done does not make it any the less a private purpose of the workman's. Where the workman has no personal end to serve in doing his work in an unnecessarily dangerous way, his injury, though due to the method selected, arises out of the employment. If he is actuated by an honest belief, however mistaken and wrong-headed, that in this way he will facilitate the work entrusted to him, this is clearly so;⁶⁸ but he need not have such definite belief. It is enough if he has not any personal end to serve. He may recover where he has no particular conscious object at all, but selects the dangerous method out of sheer stupidity or recklessness.⁶⁹ The final test is the immediate object the servant has in view. This is subjective to the servant and depends wholly upon his state of mind as exhibited by his actions.

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[*To be continued.*]

⁶⁸ As in *Harding v. Brynddu Colliery Co.*, [1911] 2 K. B. 747, 4 B. W. C. C. 269, *ante*, n. 54; *Tobin v. Hearn*, [1910] 2 I. R. 639, *ante*, n. 39.

⁶⁹ As in *Astley v. Evans & Co.*, [1911], 1 K. B. 1036, 4 B. W. C. C. 209, *aff'd* in House of Lords, [1911] A. C. 674, 4 B. W. C. C. 319.

THE ORIGIN OF ASSUMPSIT.

NOTHING more strikingly shows how procedural difficulties may obstruct legal development than the classic above which Mr. Ames has written the title "The History of Assumpsit."¹ The reader of that essay will recall the tugging, twisting, and straining to which the common law was subjected before the action of assumpsit became a member of the common-law family. It is our purpose to end where "The History of Assumpsit" begins, and to glance for a moment at the origin of assumpsit. The first actions of assumpsit were in semblance delictual actions, inasmuch as the remedy was pursued under the guise of a trespass on the case. The defendant who had made a promise and failed to keep it was conceived to have wronged the plaintiff, who declared accordingly in trespass on "his" case.²

It must be observed that the action of trespass on the case itself was of no great antiquity when the lawyers set to work to fashion from it the action of assumpsit. It was born in 1285, when the Statute of Westminster II provided:

"whensoever from henceforth it shall fortune in the Chancery, that in one case a writ is found, and in like case falling under like law, and requiring like remedy, is found none, the clerks in Chancery shall agree in making the writ."

The wording of the statute itself indicates the condition for which a remedy was sought. The different forms of action in existence at that time may have numbered some few hundreds, many providing exactly the same relief under different circumstances. For example, there had been very early in the law one action for injuries due to a trespass by swine, and a separate action for injuries due to a trespass by cattle. The moral is plain. The early law is on the horns of a dilemma. Its remedies become infinite in number, unless a procedure classifies all cases of like nature as having like remedies. And if the classification lack flexibility, the suitor who has not been classified is remediless. Therefore, the value of so flexible a statute

¹ 2 HARV. L. REV. 1.

² J. B. Ames, History of Assumpsit, 2 HARV. L. REV. 1.

as that of Westminster II to common-law jurisprudence, cannot be overestimated.

If we glance at the numberless remedies of the common law, one fact above all others is noteworthy. But a few dozen have survived. And trespass on the case, the parent, and assumpsit, the offspring, have absorbed possibly nine-tenths of the actions, each of which had its own separate procedure.

The action of trespass on the case did not attain immediately to the popularity that it now enjoys. Fitzherbert gives but fifty-two cases of "*accion sur le case*," to the end of Henry VI, which means only fifty-two reported cases between 1285 and 1471, almost two hundred years. We are interested here only in those earlier cases that arose before that doctrine of consideration from which Mr. Ames has dusted the cobwebs.

One of the earliest cases is simply a type of those cited in "The History of Assumpsit," but the argument is interesting to this discussion. It is an action against one who had undertaken to cure a horse and failed in his duty.

"A writ was brought, supposing by the writ that the defendant undertook to cure his horse of sickness, and afterward the defendant made his cure so negligently that the horse died. And the writ was challenged because it made mention of '*contra pacem*' and the opinion of the judges was that the writ was bad. The writ was produced, and there was no '*contra pacem*' in the writ, wherefore it was held good; and then it was challenged because he has counted that he had taken upon himself (to cure the) horse of his ailment &c. in which case he should have an action of covenant; and the court held the writ good. Kyrton. The defendant made his cure as well as he knew how, denying that he undertook to cure the horse of his ailment, ready &c. and he was not received to such an issue, but he was driven to say that he made his cure as well as he knew how, denying that he died for default of his cure, and they were at issue."³

Two matters are clear from this case. The court did not compel the plaintiff to sue in trespass, nor did it insist that the plaintiff take covenant for his remedy. In other words, the court enforces the undertaking. Mr. Holmes is of opinion⁴ that the case was dealt with by the court as a pure action of tort, but I cannot see that the report justifies this inference. The court holds the writ good on finding that there is no "*contra pacem*," and it refuses to consider

³ Y. B. P. 43 Edw. III, pl. 33.

⁴ The Common Law, 277.

the objection that there is a covenant. It should be remarked that the presence of the words "*contra pacem*" in a writ of trespass on the case alleging a failure to perform a duty was ground for abating the writ.⁵

That this interpretation of the case is correct is indicated by a case but sixteen years later, — an action based upon a covenant and set forth as such in the declaration.

"Action upon the case, and counted that on a certain day and year in London, a covenant was entered into between the plaintiff and the defendant, that the defendant would cure the plaintiff of a certain sickness, and he to pay him a certain sum of money, whereupon he engaged to cure him of his sickness; and the defendant should come to the Strand, and administer his medicines to him, which aggravated his sickness whereby he became worse than he was before, and would have lost his life, if he had not besought another to save him; and the writ was brought in London.

"Rikhill. Judgment of the writ, because this action is not brought upon the covenant but for the tort which is supposed to have been done in the Strand, which is in another county, wherefore the writ should be brought there.

"Thirning, Justice. He may choose, and bring the action in either county, and if he take issue upon the medicines, then summon a jury of Middlesex, and if upon his undertaking to cure, then summon a jury of London. And the writ was held good.

"Rikhill. In London, in the parish of —, we came and applied medicines to his malady, by which he was saved and cured of his sickness, and so the covenant performed.

"Thirning. The covenant in London is but the beginning of the covenant and he has said that you came to the Strand and gave to him unwholesome medicines which made him worse to which you must reply, wherefore Rikhill did so, and pleaded to this."⁶

In this case the word "*assumpsit*" is used ("*sur l'enprisel del cure*"), and the entire action rests upon the undertaking and the defendant's failure to fulfil his obligation. Indeed the defendant takes issue upon this matter, and denies directly the plaintiff's claim by saying "we performed the cure."

This is in the year 1377, less than one hundred years after the Statute of Westminster II. In 1370, the court countenanced an

⁵ Y. B. T. 45 Edw. III, fol. 17, pl. 6.

⁶ Y. B. P. 11 R. II, Fitzherbert, Accion sur le case, 37.

action in case, in which an assumpsit was expressly laid, a period of but eighty-five years after the statute. The subsequent career of assumpsit is simple and easy to follow, thanks to the work of Mr. Ames. It is desired here to trace the earlier processes by which the principles above discussed had been established. Once establish an assumpsit, an undertaking, a promise, as the basis of an action, and all related phenomena will, in time, be assimilated to it, as Mr. Ames has so ably demonstrated. But what prior development led to the recognition of a promise as the basis of an action? Let us note this distinction. The question is not, what led to the recognition of a promise as the basis of an action in tort, but what led to the recognition of a promise as the basis of any action.

Let us first examine the cases of trespass on the case to the end of Richard II, in order to determine, if possible, the general lines of liability imposed by that action. There are in all sixteen actions reported in Fitzherbert of "*accion sur le case*." They are as follows;

1. An action on the case for wrongfully taking toll. Clearly a trespass.⁷ (Held a trespass and the action on the case abated.)

2. An undertaking to cure a horse. An assumpsit.⁸

3. An action for damages due to failure to repair a ditch.⁹

4. An action against a smith for driving a nail into a horse's foot.¹⁰ Partly a trespass, partly an assumpsit.

5. An action for damages resulting from failure to repair a fence or hedge. In this case be it noted, by those whose law must have been proclaimed within the last few weeks, there is laid a duty, a breach of the duty, and resulting damage.¹¹

6. An undertaking to cure the plaintiff of sickness. A pure assumpsit, with no element of tort whatever.¹²

7. An action in case for continuing to hold a plea after the cause had been removed into the common bench.¹³

8. An action on the case, alleging that the defendant had undertaken to carry the plaintiff's mare, safe and sound, across the Humber, and that the defendant so overloaded the boat with other

⁷ Y. B. M. 41 Edw. III, fol. 24, pl. 17.

⁸ Y. B. M. 43 Edw. III, fol. 33, pl. 38.

⁹ Y. B. T. 45 Edw. III, fol. 17, pl. 6.

¹⁰ Y. B. T. 46 Edw. III, fol. 19, pl. 19.

¹¹ Y. B. H. 11 R. II, Fitzherbert, *Accion sur le case*, 36.

¹² Y. B. 11 R. II, Fitzherbert, *Accion sur le case*, 37.

¹³ Y. B. 14 Edw. III, Fitzherbert, *Accion sur le case*, 39.

things that the mare was drowned. It was objected that no tort was alleged, and that the remedy was in covenant. But it was held that the wrong was in overloading the boat, and the defendant pleaded not guilty.¹⁴

9. An action on the case for slander, in branding the plaintiff as a traitor and a robber; in open court.¹⁵

10. An action on the case for selling to the plaintiff eight cows and eight calves, belonging to a third person, which were afterward taken from the plaintiff to his damage.¹⁶

11. An action on the case against the lord in ancient demesne, who had refused to hold his court.¹⁷

12. An action on the case for disturbing a prior in his right to hold a fair.¹⁸

13. An action against a smith for driving a nail into the foot of plaintiff's horse.¹⁹

14. Case for neglect of duty to keep a close fenced, and resultant damage by straying cattle.²⁰

15. Case upon a customary duty on the part of a brewer to furnish a beadle with a certain quantity of beer:

"J. F. brought a writ of trespass against certain persons for this, that he is beadle of the hundred of H., and should have from the Brewer, three gallons of the best beer for seven pence, and says that himself and those whose estate he has in the said hundred have been seised of this (for such a time).

"Hankford. Judgment of the count, because he has not shown how he has his estate and afterward Hankford said: Still judgment of the count, because he wishes to have from every Brewer, Beer, by virtue of his office, and so he should have severed his action, because this is one trespass in itself and it was not allowed, because all in covenant are accessories.

"Hankford. He has shown that he was disturbed, in which case he should have the assise.

"Thirning. Peradventure he has nothing, but by reason of his office, for the time being, just as a clerk, although he has nothing but an occupa-

¹⁴ Lib. Ass. 22, pl. 41.

¹⁵ 30 Ass. 177, pl. 19.

¹⁶ Lib. Ass. 42, 259, pl. 8.

¹⁷ Y. B. M. 11 Edw. II, Fitzherbert, Accion sur le case, 46.

¹⁸ Y. B. P. 16 Edw. II, Fitzherbert, Accion sur le case, 47.

¹⁹ Y. B. 46 Edw. III, 19, Fitzherbert, Accion sur le case, 49.

²⁰ Y. B. 29 Edw. III, 32.

tion for a certain time, still if anyone does him a wrong to a thing which pertains to his Office, he shall have a writ of trespass, and so here."²¹

16. Case for disturbing a prior in the collection of his tithes.²²

These cases indicate with a fair degree of accuracy the use to which the action on the case was put in the first century of its existence. It must be observed, first of all, that the element of public wrong, of delict, has entirely disappeared. The presence in the count, in trespass on the case, of the words "*contra pacem*" invalidates the writ, as the action then should be trespass.²³

Again, we are driven to the conclusion that the statute has fulfilled the exact purpose for which it was designed; it has spread its wings and given shelter to a most miscellaneous flock of legal chicks. But, miscellaneous as the cases are, they fall into two general categories, — breaches of duty and assumpsits. If we seek predominance in any one type, that predominance will be found in assumpsit, for there are two well-defined cases of undertakings, two breaches of duty based on undertakings, and an action upon a custom. The remainder, as we have observed, are miscellaneous, the majority consisting of well-defined breaches of duty.

Now the problem to which the writers have sought a solution is this: "Assumpsit began as an action of trespass on the case, and the thing to be discovered is how trespass on the case ever became available for a mere breach of agreement."²⁴

One has but to examine, however, the development of the common law to observe that in its early history classes of actions were of less importance than rigorous adherence to the formula of the class or form of action chosen. Procedure prior to the Statute of Westminster II had not developed, as yet, any real or scientific classification of actions. For example, there were separate writs of ael, besael, and cosinage, actions brought for exactly the same purpose, namely, to vindicate the plaintiff's right to lands, the sole difference, in fact, being that in one case the title to land depended upon the seisin of a grandfather, in another upon the seisin of a great-grandfather, and so on. It is the case of separate writs for trespasses of pigs and cattle, in a different form.

²¹ Y. B. 19 R. II, Fitzherbert, Accion sur le case, 51.

²² Y. B. 19 R. II, Fitzherbert, Accion sur le case, 52.

²³ Y. B. 45 Edw. III, fol. 17, pl. 6.

²⁴ Holmes, The Common Law, 275.

We may find many isolated instances of attempts to use one form of action as a melting-pot for a great number of miscellaneous and more or less related kinds of litigation. The action of novel disseisin, for example, might readily have been classified as a trespass, for it was established by the Assizes of Clarendon in 1166 as a remedy against trespasses of force, and Bereford, J., in the reign of Edward II, refers to a disseisin as a tort.²⁵ Yet it never fell within the scope of the general action of trespass. On the contrary, it preserved an autonomous existence until little more than a century ago, and assimilated to itself during that time many trespasses far removed from the wrongs which gave it birth.

The hard-and-fast line of cleavage that causes all actions to the modern legal mind to sound either in trespass or in assumpsit is a purely modern creation. Cases in the early history of the common law were largely instances. In the modern common law they are members of the one group or the other.

Aside from trespass, the Statute *in Consimili Casu* was of general benefit in conferring flexibility on many forms of action.

In 3d Edward II²⁶ the Statute *in Consimili Casu* was used to give a remedy to a plaintiff who was a tenant by the curtesy, whereas the existing remedy applied only to the case of alienation by one who held in dower. It was conceded that the common law did not warrant such a writ, but it was argued that the statute²⁷ provided that "in like case demanding like remedy, a writ be made." The writ was quashed, but afterward a writ was framed which ran as follows: "And which tenements should return to him by the form of the Statute provided for a similar case." In another case of the same year, 3d Edward II,²⁸ Bereford, C. J., said:

"'No writ is maintainable outside of the course of the common law, [and] by the 'form of the Statute' unless it be expressly given by the Statute. And as to what you say about 'let the clerks of the Chancery agree,' that is to be understood of the writs in strange cases; but if your writ had not those words 'by the form of the Statute,' it would have some color, and might be maintainable.'

"Afterwards, Stanton, Judge, looked at the statute and said: 'Will

²⁵ See George F. Deiser, *Some Ancient Reporters and an Ancient Action*, 48 Am. L. Reg. N. S. 1.

²⁶ 3 Selden Society Year Book Series, 107.

²⁷ Westminster II, c. 24.

²⁸ 3 Selden Society Year Book Series, 108.

you say anything else to maintain your writ?' Ingham. 'We have nothing to say but what we have said.' Stanton, Judge. 'So this Court awards that B. go quit of this writ, and that A. be in mercy for his false plaint.'"

Four days afterward the statute was considered in the presence of Bereford, C. J., and Bardelby and Osgodby, and other examiners of the Chancery, and they amended the writ by this clause: "In like case provided."

The form of writ which they adopted was as follows:

"[The King] to the Sheriff of Yorkshire, greeting. Command John de Stiveton and Amice his wife that justly etc. they render to John le Flemyng one messuage and three bovates of land with the appurtenances in Lofthouse next Harewood, which they claim to be their right and inheritance etc., and into which John and Amice have no entry, save after the demise which Robert le Flemyng, brother of [the demandant], whose heir he is, made to Hamo de Hauterive for the life of Hamo, and which, after a demise made thereof by Hamo to William Hamilton in fee, ought to revert to [the demandant] by the form of the Statute provided in a like case (*in casu consimili*) — so he says — and whereof he complains that the said etc. Witness, myself, at W[estminster] on the third day of May in the third year of our reign."²⁹

Practically the same form is employed in a writ of entry in 18th Edward III.³⁰

Almost the same decision was reached in the case of an action brought by a life tenant in 35th Edward I,³¹ and there it was contended that as the statute only provided a remedy in the case of dower, the Statute *in Consimili Casu* authorized the writ in this case as one needing a similar remedy.

The statute was applied for the purpose of giving a remedy by writ of entry *in consimili casu* in 14th Edward III,³² and in an action of trespass on the case in 31st Edward I.³³ Bereford says in answer to an objection to the writ:

"When we find a good writ in accordance with his case, why should we deprive him of his good writ?"

²⁹ 3 Selden Society Year Book Series, 109.

³⁰ Y. B. Rolls Series, 17, 18 Edw. III, 441.

³¹ Y. B. Rolls Series, 33-35 Edw. I, 428.

³² Y. B. Rolls Series, 14 Edw. III, 116.

³³ Y. B. Roll Series, 31 Edw. I, 413.

"Mutford. 'Every writ must be sustained either by common law or by statute.'

"Bereford. 'This writ is maintainable by the law,' it having been argued that the words of the statute were 'Although such writ was not previously granted in the Chancery.'"

This is merely another instance of the use to which the statute was being put.

An action of trespass on the case appears in 15th Edward III³⁴ for neglect of a duty to maintain the walls or dykes about four perches of land, but this action was later discontinued.

The statute that gave rise to the action of trespass on the case was a piece of Aristotelian classification such as, "All houses are brick or not brick," which created at any rate a definite group for brick houses. As for the houses "not brick" they necessarily form a superlatively miscellaneous group. The same phenomenon is to be observed in the Statute *in Consimili Casu*. It really classified cases into cases of trespass and those not of trespass, or, if you like, of trespass on the case. The action of trespass thereby became definite. It was and remained the action which included those wrongs that were done "*contra pacem*."³⁵

The writ contains these words, "*tali die ostendit quare vi et armis*," etc., and concludes, "*ad grave dampnum ipsius A. et contra pacem nostram*."³⁶

And it is said, "This writ lyeth where ye Trespass is made or done to any man or woman, and supposeth that the Trespass is done with force and armes."³⁷

On the other hand, the action of trespass on the case "*in rerum natura*," as the judges were so fond of remarking, became a receptacle of indefinite capacity into which every doubtful remedy, whether like trespass or not, was thrown. The only requisite was, apparently, that the writ must not assert that the basis of suit was done "*contra pacem*." Other actions on the case, it is true, were resorted to, but there were no debts on the case or covenants on the case, for when modifications of technical debts or technical covenants arose, they were sued out in an action on the case. In fact many of the cases are begun simply as actions on the case, with

³⁴ Y. B. Roll Series, 15 Edw. III, 87.

³⁶ Natura Brevium, f. 48.

³⁵ Y. B. M. 45 Edw. III, 17.

³⁷ Natura Brevium, f. 48.

no reference to trespass. The plaintiff brings an action on his case.³⁸

If the writer has clearly defined the situation, it must be obvious that the problem is not to discover how a promise ever became the basis of an action in tort. That in reality was not the case. The Statute of Westminster II was the means by which a remedy was given, not merely for trespasses, but for all those miscellaneous instances of litigation that did not fall into any well-defined category. In one case the action is made the basis of relief where a prior has been ousted practically from his franchise of taking toll. The court awards the plaintiff damages and decrees the restoration of the franchise,—an evidence in itself of the latitude which the statute afforded in providing a complete remedy.³⁹

The Statute of Westminster II was in a sense the first adventure of the common-law procedure in broad, general classification. If it were within the scope of this essay, we might trace the action of trespass on the case until assumpsit was given a separate existence, and trespass on the case became the remedy for enforcing the payment of damages for breach of duty. It is desired to make clear at this point only, that breach of a promise, agreement, or undertaking was regarded, even in the earliest cases, as at the most a very doubtful trespass; the agreements, contracts, undertakings, fell naturally and easily into the broad and flexible remedy afforded by the statute, and the development of assumpsit as a separate action was a matter only of time and the frequency of litigation over broken promises. When once this is understood, it is an easy matter to follow the subsequent development of assumpsit in Mr. Ames' *History of Assumpsit*.⁴⁰

We may obtain some further light upon the position of contracts prior to the statute by observing the manner in which the law dealt with miscellaneous instances of broken faith.

A century earlier, if we may believe Glanville, the common-law courts afforded no remedy in contract. He says:

"A debt sometimes arises from a letting out and a hiring, as when anyone lets out a thing to another for a certain period, in consideration of receiving a certain reward. In such case the former is bound to concede the use of the thing and the latter to pay the price. But it should be observed,

³⁸ Y. B. H. 11 R. II, Fitzherbert, *Accion sur le case*, 36.

³⁹ Y. B. M. 43 Edw. III, pl. 30.

⁴⁰ 2 HARV. L. REV. I.

upon the expiration of the term stipulated, the former may lawfully and of his own authority resume possession of his property. But if the person engaging to hire the thing should not pay the price at the appointed time, it may be asked, whether the other party can in such case forcibly resume possession by his own authority?

"But we briefly pass over the foregoing contracts, arising as they do from the consent of private individuals, because, as it has already been observed, the King's Court does not usually take cognizance of them; nor indeed, with such contracts, as may be considered in the light of private Agreements, does the King's Court intermeddle."⁴¹

Let us say only, by way of comment, that this is in the reign of Henry II, when the common law, as such, is beginning; when writs, for the first time, are issuing from a King's Court, and in the very year, perhaps, when common-law reports first begin their appearance, for it is in 1189, the beginning of the reign of Richard I, that the plea rolls begin; and they have not ceased to appear since that time. So that, at the beginning of the common law, in a reported form, there is no action that enables one to recover for a breach of contract as such. Debt there is, and covenant, but nothing resembling the later action of *assumpsit*. The general jurisdiction of contract belonged to the Church, upon the theory that one who had made a promise and broken it thereby pledged his hope of salvation.

But it is not to be supposed that contracts made their appearance in the law only with the action of *assumpsit*. Even the Saxon law affords proof of this.

"A churl who has hired another's yoke, if he agrees to pay half in fodder, must do so. If he is not so bound, he must pay half in fodder, and half in other goods."⁴²

This is one sort of contractual relation, beyond question. A somewhat similar situation arises from a rental of land.

"If a man agree for a yard of land, or more, at a fixed rent and plough it, if the lord desire to raise the land to him to service and to rent, he need not take it upon him, if the lord do not give him a dwelling, and let him [the lord] lose the crop."⁴³

⁴¹ Beames, Glanville, Introduction by Professor Joseph H. Beale.

⁴² Laws of Ine, Thorpe, *Ancient Laws and Institutes*, 141, paragraph 60; Liebermann, *Gesetze der Angelsachsen*, 117, paragraph 60.

⁴³ Thorpe, *op. cit.*, 147, paragraph 67; Liebermann, *op. cit.*, 119, paragraph 67.

The same phenomenon is present here. The law is incapable as yet of assimilating into a single form of action all of those varied legal situations at the basis of which lies a promise or an undertaking. To the early law a promise to a farmer meant one suit; a promise to a grocer, possibly another; but an inflexible procedure had not yet made it difficult to provide a remedy for both cases.

Further illustration is afforded by the Saxon oaths. If a man found his property unsound after he had bought it, he took this oath:

"In the name of Almighty God, thou didst engage to me sound and clean that which thou soldest to me, and full security against after claim, on the witness of N. who then was with us two."⁴⁴

The oath of the vendor is as follows:

"In the name of Almighty God, I knew not, in the things about which thou suest, foulness or fraud or infirmity or blemish, up to that day's-tide that I sold it to thee; but it was both sound and clean, without any kind of fraud."⁴⁵

Instances of the kind might be multiplied from the Saxon law and from the law of a later period, but the instances given sufficiently illustrate the matter in hand. It is the belief of the writer that the history of the various forms of action can never be written intelligibly unless it is understood that forms of action are the result of an attempt to create a writ flexible enough to receive a large number of instances of litigation based upon causes more or less related. For example, the term "a wrong" is of so wide a scope, that almost anything might be considered as falling within such a classification. And yet, general as the term was, it became necessary at a very early date to distinguish between wrongs of violence, and those that consisted either of mere breaches of duty or of failure to perform an act that one was bound to perform. Seen in this light, it is just as much a wrong to fail in the performance of an agreement as to fail in the performance of any other duty.

It must be understood that in the ultimate analysis every lawsuit rests upon some such elementary principle as that which is now generally recognized as the basis of an action in trespass for negli-

⁴⁴ Thorpe, *op. cit.*, 181, paragraph 7; Liebermann, *op. cit.*, 399, paragraph 7.

⁴⁵ Thorpe, *op. cit.*, 183, paragraph 9; Liebermann, *op. cit.*, 399, paragraph 9.

gence. It is at the present time universally considered necessary for the plaintiff in an action based upon negligence to show that the defendant was under a duty toward him, that there was a breach of the duty, and that the breach of the duty resulted in damage to the plaintiff. But the causal relation between a duty and the failure to observe it is in the last analysis just as much a part of an action in assumpsit as of an action in tort. If our reasoning be clear, the development of the various forms of action beginning with the Statute of Westminster II may be traced and interpreted upon this principle. Let anyone who has the curiosity examine the list of writs which Mr. Holdsworth gives in his history of English Law, or the writs in the *Natura Brevium*. They are composed of duplicates without number. Some dozens of writs may be found in the Writ of Right Group, every one of which rests essentially on the same kind of facts. As a matter of fact, writs could not be said to have an arbitrary form much before the time of Edward I, owing to the lack of any organized system of reporting cases. In Glanville's time, of which his treatise gives proof, the writs were moulded to meet the facts, and such procedure as there was, and simple as it was, was extremely flexible. It is only after classification has begun and procedure has assumed a fixed arbitrary form that the difficulty was felt in finding a remedy into which the facts might fit. Apparently, so far as assumpsit was concerned, the Statute of Westminster II filled a long-felt want. The judges made little resistance to efforts to enforce an undertaking in an action on the case, and as the cases show, objection that there is a covenant, or an undertaking, never prevailed.

The distinction between the kinds of duties violated by a tort and by a breach of contract occupies very little space in the legal mind for some time after the Statute of Westminster II. We find in a case of Michaelmas Term, 3d Edward II,⁴⁶ that Herle makes this reply to Toubey:

"Am I to hold the covenant against all folk who may oust you where a recovery against them is secured to you by the law, and where you can assign no tort in my person?"

"Herle. 'The writ says that you are to be summoned to answer not for a tort, but for a breach of covenant; and to that you make no answer. Judgment against you as undefended.'"

⁴⁶ 2 Selden Society, Year Book Series, 87.

On the other hand, a breach of covenant is at times spoken of as a tort. For example, in Michaelmas Term, 3d Edward II,⁴⁷ the argument is as follows:

"Westcote. 'We say that you yourself leased the house, etc., and by your deed bound yourself to warrant and defend. That you have not done, and so we do affirm a tort in your person, namely, a breach of Covenant.'"

This is clear enough, that the precise difference in the nature of the wrong done between failure to observe a duty and failure to observe a contract was not in the year 1309 as yet well defined.

If we review our facts, we shall find that they assume somewhat this form. The Statute of Westminster II was designed to meet strange cases, another way of expressing "cases not provided for." Every action that did not furnish a remedy for a case where a plaintiff had palpably suffered wrong was stretched by adding the words "in like case provided." In the case of real actions this was not such a difficult matter. The law had never encountered much difficulty with cases ruled by a similar principle. Let us hark back for a moment to the Saxon law. The law said, if swine eat a man's acorns, let the owner pay. Later, cattle destroy a crop. The law adds a new provision, imposing a penalty where damage is done by cattle. Our beneficent statute makes the transition a bit simpler. The Statute of Gloucester gives a specific remedy to the doweress. A tenant by the curtesy presents his claim. Shall he be remediless when his wife might have had one? Not so. The statute says "in like case provided," and the tenant in curtesy had his writ. And when a life tenant made the same plea, the court still saw the analogy, and he too had his writ.

The actions on contracts, undertakings, agreements, followed the same development. It was possible to give a man a remedy where none had existed before. After the sting is taken out of a trespass by the elimination of direct force, and the substitution of a failure to act, or an omission to perform one's duty, the various sins of omission and commission shade into each other almost imperceptibly.

We shall be far from comprehending the development of the forms of action if we ascribe to the early Year-Book judges an Austinian power of analyzing fundamental legal conceptions, and employing

⁴⁷ 2 Selden Society, Year Book Series, 85.

them as the basis of scientific redress. Each new remedy, or each new case thrown into an old classification, was the creature of expediency, and the statute was welcomed as a means of averting hardship. This is made abundantly clear by the miscellaneous instances that we have given of the operation of the statute.

Returning now to the action on the case, it will be seen that the facts of the cases given present a great variety of breaches of duty. We have counsel arguing on the one hand that a tort is charged, namely, a breach of covenant; we have counsel arguing that it is no tort, but a breach of covenant. Again, the duties for breach of which an action on the case is sustained are equally diversified. An analogy could scarcely be more far-fetched than one which admits of an action in tort for refusal to observe a customary duty to sell three gallons of beer for seven pence; yet the judges had little difficulty in finding room for a remedy in the action on the case.

Failure to perform any kind of duty was a sufficient analogy for the judges to admit an action, provided no breach of the peace was set up. As we have already observed, a breach of a contract, covenant, or undertaking was as much a breach of duty as a failure to maintain a dyke or an enclosure.

The subsequent history of *assumpsit* has been written by Mr. Ames. The introduction of consideration as an element of relief in *assumpsit* is a matter of later development with which this essay does not attempt to deal. It has been our purpose to trace the development by which a remedy was gradually afforded for such breaches of duty as arose from contractual relations. To the writer it seems clear that little difficulty was encountered after the passage of the Statute of Westminster II, in finding whatever slight analogy was needed for affording a remedy for breaches of covenant or contract in the action on the case; and the existence of a remedy being conceded, the subsequent definition and development of its fundamental attributes was a matter only of time and the frequency of like cases.

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RES JUDICATA AS A FEDERAL QUESTION.

SUPPOSE that in an action brought in a state court by A. against B., B. pleads in bar a judgment rendered in a prior action between the same parties. Suppose further that the trial court rules upon the validity and effect of the judgment and that these rulings are affirmed by the highest court of the state. Can the correctness of these rulings be tested by a writ of error in the Supreme Court of the United States?

It is, of course, familiar law that a case cannot be carried by a writ of error from a state court to the Supreme Court of the United States except in respect of federal questions which are necessary to the decision.¹ But a question is not federal unless it involves a right arising under the Constitution or laws of the United States.² The United States Constitution, however, takes care of certain classes of judgments. Thus Article IV, Section 1, provides that

"full faith and credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof."

Pursuant to the authority so conferred, Congress in 1804 enacted what is now Section 905 of the Revised Statutes.³ Within the protection of the constitutional provision and of this section of the statute come the judgments of the court of a sister state,⁴ of

¹ *Eustis v. Bolles*, 150 U. S. 361, 14 Sup. Ct. 131 (1893).

² *Eustis v. Bolles*, *supra*.

³ This section provides: "The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

⁴ *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224 (1892).

the District of Columbia,⁵ and of a territory.⁶ And it is within the judicial power vested by the Constitution in the Supreme Court to correct upon a writ of error a failure by a state court to give full faith and credit to the judgment of a federal court.⁷ If, then, a state court fail to give full faith and credit to one of the judgments just enumerated, a right arising under the Constitution and laws of the United States is violated. Consequently a writ of error to the state court will lie to redress the wrong.

But suppose that instead of giving too little faith and credit to one of the enumerated judgments a state court gives too great effect thereto. Assume that in the jurisdiction where the judgment was rendered it forecloses issues A. and B. Assume further that when the judgment is pleaded in another state and its effect is thereby drawn in question, the state court erroneously holds that it forecloses issues A., B., and C. Will a writ of error lie to the United States Supreme Court at the instance of the party thereby aggrieved?

It may well be argued that in such a case the state court has not failed to give "full faith and credit." On the contrary, it may be urged that it has given "full faith and credit" and something more. But this argument assumes that the words of the Constitution simply prescribe a minimum below which the state court must not fall. It construes the Constitution as if it read: "Not less than full faith and credit shall be given." On the other hand, it may well be argued that the words of the Constitution not only confer a right but also define the extent of that right. The words "full faith and credit" would then operate as words of definition. They would compel the court to go just so far, and would prevent it from going farther. On this theory the party who pleads the judgment may insist that it receive not less than full faith and credit, while the party against whom it is pleaded may object if it receive more than full faith and credit.

This is the construction adopted by Congress in enacting Section 905 of the Revised Statutes. That section provides that the judgments therein enumerated,

⁵ *Embry v. Palmer*, 107 U. S. 3, 25 Sup. Ct. 5 (1882).

⁶ *Gibson v. Manufacturers', etc. Ins. Co.*, 144 Mass. 81, 10 N. E. 729 (1887); *Suesenbach v. Wagner*, 41 Minn. 108, 42 N. W. 925 (1889).

⁷ *Crescent City, etc. Co. v. Butchers', etc., Co.* 120 U. S. 141, 7 Sup. Ct. 472 (1887); *Dupasseau v. Rochereau*, 21 Wall. (U. S.) 130 (1874).

"shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

Perhaps it might originally have been argued that in so defining the words of the Constitution Congress has exceeded its powers. But Article IV, Section 1, expressly confers power upon Congress to prescribe the effect of judgments within its scope. And this statute has stood in its present form since 1804. Moreover, it has frequently been before the Supreme Court (though always where the writ of error was brought upon the ground that the state court below had not given sufficient faith and credit to the judgment drawn in question), and has again and again been applied. It seems too late, therefore, to urge successfully that the statute is unconstitutional, or that the words of the Constitution do not forbid a state court to give too much faith and credit as well as too little to a judgment of a court of a sister state, of a territory, or of the District of Columbia.

It seems strange that the question has not been set at rest by a square decision, but the writer has found no such case. The point was raised, it is true, in a recent case,⁸ but the Supreme Court in holding that the state court below had given the proper measure of faith and credit to the judgment in question failed to decide it. There are, however, a considerable number of *dicta* which indicate that a writ of error would lie to a state court under such circumstances.

Thus in *Board of Public Works v. Columbia College*⁹ the court said, *obiter*, through Field, J.:¹⁰

⁸ *Everett v. Everett*, 215 U. S. 203, 30 Sup. Ct. 70 (1909). The facts are worth noting. The plaintiff brought action in New York to set aside on the ground of fraud a decree annulling her marriage to the defendant. The defendant pleaded in bar that the plaintiff had brought against him in the Probate Court of Massachusetts a petition for separate support, that he there pleaded in bar the New York decree annulling his marriage, and that the Massachusetts Court thereupon dismissed the petition. The New York court (*Everett v. Everett*, 180 N. Y. 452, 73 N. E. 231 (1905)) held that the Massachusetts judgment concluded the plaintiff in respect to the validity of the original New York decree, and this ruling was affirmed by the Supreme Court of the United States. For other cases in accord as to the effect as *res judicata* of an adjudication as to the validity of a prior judgment see *Bidwell v. Bidwell*, 139 N. C. 402, 52 S. E. 55 (1905); *Dobson v. Pearce*, 12 N. Y. 156 (1854); *Peet v. Hatcher*, 112 Ala. 514, 21 So. 711 (1895); *Fauntleroy v. Lum*, 210 U. S. 230, 28 Sup. Ct. 641 (1908).

⁹ 17 Wall. (U. S.) 521 (1873).

¹⁰ *Ibid.* 529.

"No greater effect can be given to any judgment of a court of one State in another State than is given to it in the State where rendered. Any other rule would contravene the policy of the provisions of the Constitution and laws of the United States on that subject."¹¹

And in *Crescent, etc. Co. v. Butchers', etc., Co.*¹² the court said, *obiter*, through Matthews, J.:¹³

"It may be conceded, then, that the judgments and decrees of the Circuit Court of the United States, sitting in a particular state, in the courts of that state, are to be accorded such effect, and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority. But it is within the jurisdiction of this court to determine, in this case, whether such due effect has been given by the Supreme Court of Louisiana to the decrees of the Circuit Court of the United States here drawn in question."¹⁴

Again, in *Tilt v. Kelsey*¹⁵ it was said, *obiter*, through Moody, J.:¹⁶

"They [the judgments] can have no greater or less or other effect in other courts than in those of their own state."

It is manifest that a judgment of a court of the same state in which such judgment is pleaded is not within Article IV of the Constitution, or Revised Statutes, Section 905.¹⁷ It is not a judgment of a different state. Nor can the judgment of a court of a foreign country claim the protection of that article or statute.¹⁸ A foreign country is not a state within the meaning of Article IV. As to such judgments, therefore, the question is whether they can claim the protection of some other provision of the Constitution.

It may be conceded that the effect to be given to the judgment of a court of a foreign country might be prescribed by treaty.¹⁹ And

¹¹ For another *dictum* in accord see *Robertson v. Pickerell*, 109 U. S. 608, 611, 3 Sup. Ct. 407, 409 (1883).

¹² 120 U. S. 141, 7 Sup. Ct. 472 (1887).

¹³ *Ibid.* 147.

¹⁴ For other *dicta* in accord see *Dupasseeur v. Rochereau*, 21 Wall. (U. S.) 130, 135 (1874); *Metcalf v. Watertown*, 153 U. S. 671, 676, 14 Sup. Ct. 947 (1894); *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 645, 20 Sup. Ct. 506 (1900); *Pittsburgh, etc. Ry. Co. v. Long Island, etc. Trust Co.*, 172 U. S. 493, 510, 19 Sup. Ct. 238 (1899).

¹⁵ 207 U. S. 43, 20 Sup. Ct. 1 (1907).

¹⁶ *Ibid.* 57.

¹⁷ *Phoenix Ins. Co. v. Tennessee*, 161 U. S. 174, 16 Sup. Ct. 471 (1896).

¹⁸ *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. 139 (1895).

¹⁹ See *In re Ross*, 140 U. S. 453, 11 Sup. Ct. 897 (1891) (powers and procedure of United States Consular Court in Japan).

since treaties with foreign nations are part of the supreme law of the land²⁰ a federal question would be presented if a right under such treaty were drawn in question.²¹ But aside from such a treaty a ruling by a state court upon the validity or effect of a judgment of a court of a foreign country can rise no higher, as presenting a federal question, than a ruling by the same court upon the validity or effect of one of its own judgments. These two classes of judgments will therefore be treated together.

It is elementary that a valid and well-pleaded judgment operates by way of estoppel. The question therefore is whether a ruling of a state court upon the effect as an estoppel of a judgment of its own or of a foreign court necessarily draws in question any right under the Constitution or the federal law. It may be argued that if the court erroneously finds an estoppel where none existed, it has deprived the party aggrieved of his day in court. It may also be argued that if the court erroneously fails to give full effect to the judgment it has impaired the obligation of contract. Each contention, if it be sound, manifestly draws in question a constitutional right.

Suppose, then, that the state court has failed to give due effect by way of estoppel to a judgment of its own or of a court of a foreign country. Has it impaired the obligation of contract? It may be admitted that text writers have called a judgment a contract of record, and that an action thereon sounds in contract and not in tort. It is also true that state statutes which impaired judgments founded on agreements express or implied and thereby impaired the original obligation have been held to offend against the constitutional prohibition.²² But that was because the original contractual obligation was impaired, not because of interference with the judgment.²³ If the cause of action was not founded on a contract, reduction of it to judgment will not confer contractual character. A judgment is not born of a meeting of minds nor created by mutual assent. Hence a judgment founded on a tort²⁴ or on an award of commissioners in eminent domain proceedings²⁵

²⁰ U. S. Const., Art. VI.

²¹ See also U. S. Const., Art. III, Sec. 2.

²² *Louisiana ex rel. Nelson v. St. Martin's Parish*, 111 U. S. 716, 4 Sup. Ct. 648 (1884).

²³ *Louisiana ex rel. Nelson v. St. Martin's Parish*, *supra*.

²⁴ *Louisiana v. Mayor of New Orleans*, 109 U. S. 285, 3 Sup. Ct. 211 (1883); *Freeland v. Williams*, 131 U. S. 405, 9 Sup. Ct. 763 (1889).

²⁵ *Garrison v. City of New York*, 21 Wall. (U. S.) 196 (1874).

is not a contract within Article I, Section 10, of the Constitution. It is clear, therefore, that judgments, simply as judgments, cannot claim the protection of this constitutional provision.

But even judgments founded upon a contract express or implied have no special sanctity by way of estoppel under Article I, Section 10. The question whether a contract has come into being, or whether, if valid, its scope is greater or less, raises no question as to impairment of the obligation of contract by the law of a state.²⁶ Clearly, therefore, a ruling upon the validity or invalidity of a judgment, or upon the nature and scope of the issues concluded thereby under the principle of *res judicata*, cannot raise any question with respect to impairing the obligation of contract. It follows that a failure of a state court to give sufficient effect as an estoppel to one of its own judgments,²⁷ or to a judgment of a court of a foreign nation, does not raise a federal question.

But suppose that a state court gives too great effect, by way of estoppel, to one of its own judgments or to a judgment of a court of a foreign country. Is the party aggrieved thereby deprived of due process of law or of the equal protection of the laws within the meaning of the Fourteenth Amendment? It is manifest that a judgment may fail as an estoppel for want of jurisdiction over the party sought to be bound,²⁸ or because it does not foreclose the issue in question.²⁹ In the one case the question is whether any estoppel exists as against this defendant; in the other, as to whether a given estoppel as against this defendant covers the case at bar. This distinction, as we shall see, is important. A personal judgment rendered without personal jurisdiction is a nullity.³⁰ To give any effect thereto is a denial of due process of law.³⁰ And this is true even where the judgment is rendered in the same state where it is drawn in question.³¹ If, then, a state court give effect to a judgment rendered in the same state, which judgment is a nullity for want of jurisdiction, the party aggrieved may take the case to the Supreme Court of the United States upon writ of error.³¹

²⁶ *Railway Co. v. Rock*, 4 Wall. (U. S.) 177 (1866).

²⁷ *Phoenix Ins. Co. v. Tennessee*, 161 U. S. 174, 16 Sup. Ct. 471 (1896).

²⁸ *Pennoyer v. Neff*, 95 U. S. 714 (1877); *Hall v. Lanning*, 91 U. S. 160 (1875); *Brown v. Fletcher's Estate*, 210 U. S. 82, 28 Sup. Ct. 702 (1908).

²⁹ *Hughes v. United States*, 4 Wall. (U. S.) 232 (1866).

³⁰ *Pennoyer v. Neff*, 95 U. S. 714 (1877); *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. 1108 (1893).

³¹ *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. 1108 (1893).

This was squarely decided in *Scott v. McNeal*.³² In that case Scott brought against McNeal an action of ejectment in the Superior Court of Thurston County, Washington. Scott proved title in himself in 1888. McNeal then offered in evidence a judgment of the Probate Court of Thurston County, which adjudged Scott to be dead and granted administration upon his estate. Under this decree an administrator was appointed who, pursuant to an order of court, sold the lands in question to one Ward, under whom the defendant claimed. The Superior Court held the probate proceedings to be valid, and the Supreme Court of Washington affirmed the judgment, whereupon the case was brought to the Supreme Court of the United States upon a writ of error. That court held that a probate proceeding upon a living person was void for want of jurisdiction; that to give effect to such a proceeding even in the same state was a denial of due process of law; and that the Supreme Court had jurisdiction upon a writ of error to the state court to review and reverse such a judgment.

We now pass to the other branch of this question. Assuming that a judgment of a court of the same state or of a foreign country binds the parties, and that the only question is as to the extent of the estoppel thereby created, is it a denial of due process if the court erroneously give too wide effect to such estoppel? Here again there is a singular dearth of authorities.

In *Gilles v. Stinchfield*,³³ Stinchfield brought action in the Superior Court of Tuolumne County, California, to recover the value of certain gold alleged to have been taken from the plaintiffs' mining claim by the defendants. One branch of the case involved a question under certain sections of the Revised Statutes of the United States, but the California court decided against the defendant upon the ground of an alleged estoppel by deed. In dismissing the writ of error the United States Supreme Court said, through Chief Justice Fuller:

"But the decision of the Supreme Court [of California] was clearly based upon the estoppel deemed by that court to operate against plaintiffs in error upon general principles of law and the Statute of California in respect of such a conveyance as that to Stinchfield, irrespective of any Federal question. And this was an independent ground broad

³² 154 U. S. 34; 14 Sup. Ct. 1108 (1893).

³³ 159 U. S. 658, 16 Sup. Ct. 131 (1895).

enough to maintain the judgment. The writ of error must, therefore, be dismissed."

In *Phoenix, etc. Ins. Co. v. Tennessee*³⁴ the plaintiff (Tennessee) brought action to recover certain taxes. The defendant insurance company pleaded in bar a certain judgment rendered in the same state. The trial court held the judgment to be no bar, and this was affirmed by the Supreme Court of Tennessee. The United States Supreme Court in affirming the judgment below said, through Brewer, J.:

"We think the decision of the Supreme Court [of Tennessee] as to the weight to be given the judgment is not reviewable by us because it is not a Federal question. . . . If it were otherwise, every decision of a state court, claimed to be erroneous, which involved the failure to give what the defeated party might claim to be the proper weight to one of its own judgments, would present a Federal question, and would be reviewable here."

In *Beals v. Cone*³⁵ the plaintiff brought action in the state court of Colorado with respect to a certain mining claim. One contention of the plaintiff was as to the existence of an alleged estoppel *in pais* against the defendant. The Supreme Court of Colorado ruled against the plaintiff, who sued out this writ of error. In dismissing the writ for want of jurisdiction the United States Supreme Court said, through Brewer, J.:

"The estoppel was not of record but *in pais*, arising, as contended from contradictory statements made by one of the defendants, at a different time and place. Whether such statements work an estoppel depends not upon the Constitution or any law of Congress, involves no Federal question, but is determined by rules of general law."

In *Schaefer v. Werling*³⁶ the question was as to the validity of a certain paving assessment. One defense claimed by the lot owner (Schaefer) was an estoppel *in pais*. The trial court ruled against the estoppel, which judgment was affirmed by the Supreme Court of Indiana. In affirming the judgment, Brewer, J., said:

"It may be observed that, so far as the question was one of estoppel, it was purely a state and not a Federal question."

³⁴ 161 U. S. 174, 16 Sup. Ct. 471 (1896).

³⁵ 188 U. S. 184, 23 Sup. Ct. 275 (1902).

³⁶ 188 U. S. 516, 23 Sup. Ct. 449 (1902).

It must be noted, however, that none of these cases decide our precise question as to the effect of giving too wide scope to a judgment of a court of a foreign country or of the same state. In *Phoenix, etc. Ins. Co. v. Tennessee* the alleged error was a failure to give sufficient effect as an estoppel to the judgment in question. The language quoted, it is true, is sufficient to cover our problem. But it goes too far, unless that case is to be distinguished from *Scott v. McNeal* on the ground that in the *McNeal* case the judgment was a nullity, while in the *Tennessee* case the judgment was admittedly valid and the only question was as to its effect as an estoppel. In *Beals v. Cone* and *Schaefer v. Werling*, also, the alleged error was a refusal to find an estoppel *in pais*. Neither, therefore, decide what is the effect of erroneously finding and giving too great effect to an estoppel by judgment. In *Gilles v. Stinchfield*, however, the error alleged was that the California court erroneously found an estoppel by deed, and it was held that this presented no federal question. That case, therefore, indicates that to sustain an estoppel by deed, even erroneously, does not violate the Fourteenth Amendment.

If, then, the estoppel created by a valid judgment of a court of the same state or of a foreign country is to be treated like questions of estoppel *in pais*, or by deed, the question is whether the Fourteenth Amendment guarantees to every litigant as an element of due process the right to litigate every relevant issue in his case. Logically it seems somewhat difficult to distinguish between raising an estoppel by a void judgment and erroneously extending the estoppel raised by a valid judgment. In each case the litigant is improperly prevented from litigating an issue which he is legally entitled to litigate. There is, however, a difference in degree if not in kind. And there are a good many authorities which indicate that the Fourteenth Amendment does not guarantee the right to litigate every relevant issue. Thus a summary writ of distress may issue against a customs collector to recover the amount found due upon a departmental audit of the collector's accounts, without any preliminary trial.³⁷ Again, the court will accept as conclusive the determination of the executive upon a political question, such as the date when California was conquered,³⁸ or the danger of foreign

³⁷ *Murray v. Hoboken Land, etc. Co.* 18 How. (U. S.) 272 (1855).

³⁸ *United States v. Yorba*, 1 Wall. (U. S.) 412 (1863); *Hornsby v. United States*, 10 Wall. (U. S.) 224 (1869).

invasion,³⁹ or as to which of two rival state governments is the legal government,⁴⁰ even though the litigant was not party to the decision of the question. In the same way the court will not review the decision of the proper administrative officer that an alleged Chinese⁴¹ or Japanese⁴² person is not entitled to enter the United States. And where a discretion has been confided by law to an executive officer, his honest decision on questions of fact is final.⁴³ The effect given to decisions of the federal Land Office upon questions of fact is another example of the same principle.⁴⁴ In all these cases the decision might be right or might be wrong upon the merits, but it was held that the merits of the question could not be litigated, and that the decision was final. These cases, therefore, show that the right to try every relevant issue upon the merits is not necessarily an element either of due process or of equal protection of the laws. And since the Fourteenth Amendment does not guarantee freedom from judicial error to litigants in state courts,⁴⁵ it is sufficient if the court decides rightly or wrongly as to the existence and scope of the estoppel created by its own valid judgment or by the valid judgment of a court of a foreign country.

The cases then point to the following conclusions:

1. The Supreme Court of the United States has jurisdiction upon a writ of error to review a ruling by a state court as to the effect of a judgment of a federal court, or of a court of another state, of a territory, or of the District of Columbia, whether the error alleged be that too great or too little faith and credit was given to such judgment.

³⁹ *Martin v. Mott*, 12 Wheat. (U. S.) 19 (1827).

⁴⁰ *Luther v. Borden*, 7 How. (U. S.) 1 (1849).

⁴¹ *United States v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644 (1904).

⁴² *Nishimura Ekiu v. United States*, 142 U. S. 651, 12 Sup. Ct. 336 (1892).

⁴³ *Hadden v. Merritt*, 115 U. S. 25, 5 Sup. Ct. 1169 (1885) (value of the Mexican dollar); *Keim v. United States*, 177 U. S. 290, 20 Sup. Ct. 574 (1900) (dismissal of subordinate for inefficiency); *United States v. Johnston*, 124 U. S. 236, 8 Sup. Ct. 446 (1888) (amount and propriety of the expenses of a special agent); *United States v. Milwaukee, etc. Ry.*, 5 Biss. (U. S.) 410, 421 (1873) (as to whether a proposed bridge will obstruct navigation).

⁴⁴ *Vance v. Burbank*, 101 U. S. 514 (1879); *Johnson v. Drew*, 171 U. S. 93, 18 Sup. Ct. 800 (1898); *Gertgens v. O'Connor*, 191 U. S. 237, 24 Sup. Ct. 94 (1903).

⁴⁵ *Bonner v. Gorman*, 213 U. S. 86, 29 Sup. Ct. 483 (1909); *Central Land Co. v. Laidley*, 159 U. S. 103, 16 Sup. Ct. 80 (1895); *Arrowsmith v. Harmoning*, 118 U. S. 194, 6 Sup. Ct. 1023 (1886). But on this point see an interesting article by Henry Schofield in 3 Ill. L. Rev. 195.

2. The Supreme Court of the United States has jurisdiction to review and correct upon a writ of error a ruling by a state court that a judgment rendered in the same state or in a foreign country without jurisdiction binds and estops the appellant.

3. Assuming that a valid judgment binding upon the defendant has been rendered by a court of the state in which the judgment is drawn in question or of a foreign country, the Supreme Court of the United States has no jurisdiction to review the effect given thereto as an estoppel, whether the alleged error be that too great or too little effect as an estoppel has been given.

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CORRECTION. — Attention is called to an error in the February issue in the statement of the decision in the case of *Brainerd v. State*, 131 N. Y. Supp. 221 (Ct. of Claims). 25 HARV. L. REV. 388. A majority of the court held that costs should not be allowed.

THE PATENTEE'S MONOPOLY AND THE ANTI-TRUST LAW. — How far does the Sherman Anti-Trust Act conflict with the monopoly granted to the inventor by the patent law?

The patent statute gives the right to exclude others from making, using, and vending the patented article.¹ But it gives nothing more.² It does not give the right to make, use, and vend, nor the property right in the patented chattel, nor the right to make contracts concerning it. These rights the patentee already has. The patented article itself, then, and contracts in reference to it are subject to the law of the land.³ Thus it is subject to the police power of the state,⁴ the law of public service,⁵ and the criminal law.⁶

¹ U. S. COMP. STAT., 1901, § 4884, grants to the patentee "for the term of seventeen years the exclusive right to make, use, and vend the invention or discovery."

² See *Bloomer v. McQuewan*, 14 How. (U. S.) 539, 549.

³ See *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 77 Fed. 288, 293.

⁴ A patented oil must conform to the standard of safety prescribed by the state. *Patterson v. Kentucky*, 97 U. S. 501. A patentee of medicine must take out a state license to prescribe it as a physician. *Jordan v. The Overseers of Dayton*, 4 Oh. 294.

⁵ That the telephone is patented is no excuse for refusing service. *Chesapeake & Potomac Tel. Co. v. Baltimore & Ohio Tel. Co.*, 66 Md. 399, 7 Atl. 809.

⁶ A state statute may prohibit the use of a patented lottery device. *Vannini v. Paine*, 1 Har. (Del.) 65.

But the criminal law as to monopolies embodied in the Sherman Act was not intended to repeal the patent law.⁷ In his own domain the patentee remains czar.⁸ Contracts, therefore, which simply maintain his right to exclude others from making, using, and vending the patented article are valid.⁹ The patentee need not license at all,¹⁰ and he may ordinarily license on what terms he pleases.¹¹ He may license one to make, another to vend.¹² Though the vendor of ordinary chattels cannot fix the resale price so that the purchaser with notice is bound,¹³ the patentee's right has often been recognized.¹⁴ Even by contract, the ordinary vendor cannot determine a resale price if he constructs a system of such contracts with competing dealers.¹⁵ But the patentee may fix the reselling price by a single contract,¹⁶ or by a system of contracts, which stifle competition between dealers.¹⁷ That the patentee owns several other patents does not abridge this right.¹⁸ In these cases, the patentee merely subdivides his domain.

Has the patentee a right to extend his monopoly to unpatented articles? Conditions in licenses that the licensee purchase certain unpatented supplies only from the patentee have often been upheld.¹⁹ But even this doctrine has been limited to articles "not of common use, such as can be used only with the patented device."²⁰ The Supreme Court has so far declined to pass on the doctrine.²¹ A state statute expressly prohibiting such form of license seems constitutional.²²

⁷ See *Bement v. National Harrow Co.*, 186 U. S. 70, 92, 22 Sup. Ct. 747, 756.

⁸ See *Victor Talking Machine Co. v. The Fair*, 123 Fed. 424, 426.

⁹ *Bement v. National Harrow Co.*, *supra*.

¹⁰ *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, 28 Sup. Ct. 748.

¹¹ See *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, 154 Fed. 358, 362.

¹² See *Dorsey Revolving Harvester Rake Co. v. Bradley Mfg. Co.*, 12 Blatchf. (U. S.) 202, 204, Fed. Cas., No. 4,015, p. 947.

¹³ *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 28 Sup. Ct. 722 (copyrighted books); *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376 (proprietary medicine).

¹⁴ *New Jersey Patent Co. v. Schaefer*, 144 Fed. 437; *The Fair v. Dover Mfg. Co.*, 166 Fed. 117; *Automatic Pencil Sharpener Co. v. Goldsmith*, 190 Fed. 205. But this right has not been settled by the Supreme Court. See *Edison v. Smith Mercantile Co.*, 188 Fed. 925, 926. In the analogous case, the copyright-holder's right has been denied. *Bobbs-Merrill Co. v. Straus*, *supra*. In view of the prejudice of the common law against restraints on the alienation of chattels, the question may still be deemed open. See *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 404, 31 Sup. Ct. 376, 383.

¹⁵ *Dr. Miles Medical Co. v. Park & Sons Co.*, *supra*. This case set at rest the idea which had been cropping up in the lower federal courts that medicines manufactured under secret process were entitled to special favor. See *Dr. Miles Medical Co. v. Platt*, 142 Fed. 606.

¹⁶ *Bement v. National Harrow Co.*, *supra*. The ordinary vendor may fix the reselling price in a single transaction. *Garst v. Harris*, 177 Mass. 72, 58 N. E. 174.

¹⁷ *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, *supra*; *Goshen Rubber Works Co. v. Single Tube Automobile & Bicycle Tire Co.*, 166 Fed. 431.

¹⁸ *Indiana Mfg. Co. v. Case Threshing Machine Co.*, 154 Fed. 365.

¹⁹ *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, *supra*; *Dick Co. v. Henry*, 149 Fed. 424; *Crown Cork & Seal Co. v. Brooklyn Bottle Stopper Co.*, 172 Fed. 225.

²⁰ *Cortelyou v. Johnson & Co.*, 145 Fed. 933.

²¹ See *Cortelyou v. Johnson & Co.*, 207 U. S. 196, 28 Sup. Ct. 105. The case of articles not of common use is now pending in the Supreme Court on *certiorari*. *Dick Co. v. Henry*, *supra*. See *Crown Cork & Seal Co. v. Standard Brewery*, 174 Fed. 252, 259.

²² *Opinion of the Justices*, 193 Mass. 605, 81 N. E. 142.

But the patentee went further in a recent case. By a system of licenses of a patented tool, useful but not indispensable in the manufacture of bathtubs, the patentee fixed non-competitive prices on the unpatented bathtubs in the hands of manufacturers and dealers. *United States v. Standard Sanitary Mfg. Co.*, 191 Fed. 172 (Circ. Ct., D. Md.). The system was held illegal under the Sherman Act. The patentee's right to monopoly in the patented article was held to protect him no further. The distinction between this and the last class of cases seems clear. In them reselling prices were not regulated, and as to selling competition had freer play. Moreover, the articles were incidental to the patented device. Judged by the light of reason, such incidental restrictions on incidental articles may well be valid.²³

Again, where the owners of different patents restrict competition between themselves the monopoly is extended beyond that conferred by the patent grant.²⁴ For the imperfect competition between the patented articles is thus destroyed. The right to exclude others from the patented article alone does not sanction the suppressing of competition with a different article, though patented. The scheme is clearly illegal if the restriction of competition between the different patentees extends beyond the life of their patents,²⁵ or includes articles not patented.²⁶

DISCRIMINATION BY RAILROADS IN ELEVATOR ALLOWANCES TO SHIPPERS. — The utilization of control over the instrumentalities of public service to foster monopolies in other trades constitutes one great vice of most discrimination.¹ It is well established that public service companies must not take advantage of their exceptional position to discriminate in favor of their collateral business undertakings.² Wherever they engage in serving themselves, the obvious opportunity for secret discrimination justifies suspicious scrutiny and restriction.³ The danger inherent in such combinations of conflicting interests has even been held sufficient to render them illegal *per se*.⁴ Thus interstate carriers are forbidden to

²³ Possibly the vendor of an ordinary chattel may similarly require the purchase of incidental supplies as part of the price.

²⁴ *Blount Mfg. Co. v. Yale & Towne Mfg. Co.*, 166 Fed. 555; *National Harrow Co. v. Quick*, 67 Fed. 130; *National Harrow Co. v. Hench*, 83 Fed. 36. *Contra*, *United States Consolidated Seeded Raisin Co. v. Griffin & Skelley Co.*, 126 Fed. 364; *Central Shade-Roller Co. v. Cushman*, 143 Mass. 353, 9 N. E. 629.

²⁵ *Strait v. National Harrow Co.*, 18 N. Y. Supp. 224.

²⁶ *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 31 Pac. 581; *State v. Creamery Package Mfg. Co.*, 110 Minn. 415, 126 N. W. 126, 623. *Cf.* *Straus v. American Publishers' Association*, 177 N. Y. 473, 69 N. E. 1107.

¹ See *Hays v. Pennsylvania Co.*, 12 Fed. 309, 313; *Scofield v. Railway Co.*, 43 Oh. St. 571, 609, 3 N. E. 907, 923.

² *Brass v. North Dakota ex rel. Stoesser*, 153 U. S. 391, 14 Sup. Ct. 857; *Louisville Transfer Co. v. American District Tel. Co.*, 1 Ky. L. J. 144.

³ *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 26 Sup. Ct. 272; *In the Matter of Grain Rates*, 7 Interst. C. Rep. 33. See 2 WYMAN, PUBLIC SERVICE CORPORATIONS, § 1359.

⁴ *Central Elevator Co. v. People ex rel. Moloney*, 174 Ill. 203, 51 N. E. 254; *Hannah v. People ex rel. Attorney General*, 108 Ill. 77, 64 N. E. 776. See 1 WYMAN, PUBLIC SERVICE CORPORATIONS, § 710; 20 HARV. L. REV. 511, 529-531.

transport commodities in which they have an interest.⁵ But shippers of goods have always been allowed to profit simultaneously as lessors of the facilities for their transportation,⁶ and this is now expressly permitted by the Interstate Commerce Act.⁷ But shippers who are unwilling or unable to invest in this independent, incidental business should be entitled to demand service in all ways equivalent to that which others are permitted or invited to provide for themselves.⁸ The latter should receive the fair rental value of their property, but no favored position as to the public service itself by reason of their dual character.⁹ Their coöperation cannot relieve the carrier of its primary public duty to furnish facilities for all without discrimination.¹⁰

Consequently, when the Interstate Commerce Commission, having permitted¹¹ an allowance for transshipment at the Missouri River of grain belonging largely to the elevator owners, found, on rehearing, that they were taking advantage of access to their own grain during elevation to clean, clip, mix, and grade it, from which treatment arose their greatest profit, as dealers, it forbade further compensation for the transfer of grain so treated.¹² The Supreme Court has recently held¹³ that in this the commission exceeded its powers, apparently on the ground that Congress had authorized allowances to shippers for every use of facilities, irrespective of preferential advantages involved in the use.¹⁴ *Interstate Commerce Commission v. Duffenbaugh*, 32 Sup. Ct. 22. But if their right to compensation is as agencies in the public service of transportation, the carrier should not permit these elevators in that capacity

⁵ 34 U. S. STAT. AT LARGE, c. 3591, p. 585, FED. STAT., SUPP., 1909, 257. See *United States v. Lehigh Valley R. Co.*, 220 U. S. 257, 273, 31 Sup. Ct. 387, 391.

⁶ See *Chicago & A. Ry. Co. v. United States*, 156 Fed. 558, 561. But see *In the Matter of Elevator Allowances*, 10 Interst. C. Rep. 309, 326; 12 *id.* 85, 88.

⁷ 34 U. S. STAT. AT LARGE, c. 3591, p. 589, FED. STAT., SUPP., 1909, 266. All such allowances must be scheduled and offered to persons and places without discrimination. *Wisconsin Ry. Co. v. United States*, 169 Fed. 76; *Atchison v. Missouri Pacific Ry. Co.*, 12 Interst. C. Rep. 111.

⁸ *State ex rel. v. C. N. O. & T. P. Ry. Co.*, 47 Oh. St. 130, 23 N. E. 928; *Rice v. Louisville & Nashville R. Co.*, 1 Interst. C. Rep. 722. See *Penn Refining Co. v. Western N. Y., etc. R. Co.*, 208 U. S. 208, 220, 28 Sup. Ct. 268, 273.

⁹ *Chicago & A. R. Co. v. Interstate Commerce Commission*, 173 Fed. 930. The lower federal court in the principal case, *infra*, did not distinguish advantages attributable only to a favored position in point of service from the legitimate additional return above other shippers for the use of facilities. *Peavey v. Union Pacific R. Co.*, 176 Fed. 409. The slight advantage of information of competing shipments seems unavoidable when leasing is permitted. See *Consolidated Forwarding Co. v. Southern Pacific Co.*, 9 Interst. C. Rep. 182, 206 e; *Muskogee Commercial Club v. Missouri, etc. Ry. Co.*, 12 Interst. C. Rep. 312, 317.

¹⁰ *Chesapeake & Ohio Ry. Co. v. Standard Lumber Co.*, 174 Fed. 107. This is held in cases requiring private coal cars to be counted against their owners in distribution of facilities among shippers. *Chicago & A. R. Co. v. Interstate Commerce Commission*, *supra*; *United States v. Baltimore & Ohio R. Co.*, 165 Fed. 113. See *Interstate Commerce Commission v. Illinois Central R. Co.*, 215 U. S. 452, 469, 477, 30 Sup. Ct. 155, 161, 163.

¹¹ In the *Matter of Elevator Allowances*, 10 Interst. C. Rep. 309; 12 *id.* 85.

¹² In the *Matter of Elevator Allowances*, 14 Interst. C. Rep. 315; *Traffic Bureau, etc. v. Chicago, Burlington & Quincy R. Co.*, *id.* 317.

¹³ Mr. Justice McKenna dissented with an opinion in which Mr. Justice Hughes concurred.

¹⁴ See *Union Pacific R. Co. v. Updike Grain Co.*, 32 Sup. Ct. 39, 41.

to perform a greater service for themselves as shippers than for other shippers.¹⁵

The statute permits compensation only for services in transportation.¹⁶ Here the very unloading and reloading for which these owners are paid constitutes, as to their own grain, an expensive, inseparable part of a commercial process,¹⁷ the entire expense of which they would normally charge to their private business as grain dealers, as other shippers are obliged to do. To permit milling, dressing, or otherwise treating in transit is not a part of the duty of transportation, but is a privilege commonly accorded by carriers, ordinarily for a slight additional charge.¹⁸ All such privileges must be scheduled with the published rates,¹⁹ and the carrier in granting them must not discriminate between localities or persons.²⁰ It seems that the expense of performing such treatment for all shippers alike may under some circumstances be absorbed in the rate for transportation;²¹ but there is no precedent authorizing the carrier to share the cost of the operation for those shippers alone owning elevators,²² or to afford to them, without undergoing any expense for unloading, an opportunity to treat in transit which is not scheduled nor offered to other shippers.²³ It is submitted, therefore, that the compensation is not in fact for services in transportation, but a contribution to the commercial expenses of some dealers, to the serious prejudice of their competitors.

RAILROAD RECEIVERS. — Public interest requires that railroads shall continue to serve the public even though they have drifted into financial difficulties.¹ To permit this and to prevent mortgagees from foreclosing

¹⁵ Cf. *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 31 Sup. Ct. 279; *United States v. Oregon R., etc. Co.*, 159 Fed. 975; *Interstate Commerce Commission v. Reichmann*, 145 Fed. 235.

¹⁶ The material part of section 4 of the Act reads as follows: "If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable. . . ." 34 U. S. STAT. AT LARGE, c. 3591, p. 589, FED. STAT., SUPP., 1909, 266.

¹⁷ *Chicago & A. Ry. Co. v. United States*, *supra*; *General Electric Co. v. New York Central, etc. R. Co.*, 14 Interst. C. Rep. 237; *Solvay Process Co. v. D. L. & W. R. Co.*, 14 *id.* 246. These cases held that no allowance could be made for the use of internal transportation facilities essential to the economical conduct of large commercial plants.

¹⁸ *Southern Ry. Co. v. St. Louis Hay & Grain Co.*, 214 U. S. 297, 29 Sup. Ct. 678; *In the Matter of Cotton Rates*, 8 Interst. C. Rep. 121, 135; *Diamond Mills v. Boston & Maine R. Co.*, 9 *id.* 311.

¹⁹ 34 U. S. STAT. AT LARGE, c. 3591, p. 584, FED. STAT., SUPP., 1909, 260. See *Central Yellow Pine Association v. Vicksburg, etc. R. Co.*, 10 Interst. C. Rep. 193, 216; *In the Matter of Cotton Rates*, *supra*, 135.

²⁰ See *Southern Ry. Co. v. St. Louis Hay & Grain Co.*, *supra*, 300; *Muskogee Commercial Club v. Missouri, etc. Ry. Co.*, *supra*, 317; *State ex rel. Railroad Commissioners v. Atlantic Coast Line R. Co.*, 59 Fla. 612, 623, 52 So. 4, 8.

²¹ *Merchant's Cotton Press & Storage Co. v. Illinois Central R. Co.*, 17 Interst. C. Rep. 98.

²² Cf. *Wight v. United States*, 167 U. S. 512, 17 Sup. Ct. 822; *Evershed v. London & N. W. Ry. Co.*, 2 Q. B. D., 254.

²³ Cf. *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, *supra*.

¹ *Fosdick v. Schall*, 99 U. S. 235. See JONES, CORPORATE BONDS AND MORTGAGES, § 555.

on their tangible property, the American courts have been compelled to resort to judicial legislation,² for a railroad mortgage purports upon its face to give the ordinary common-law rights.³

By two magnificent statutes, passed nearly half a century ago, England once and for all placed her railroad law upon a sound foundation. By the first,⁴ the issue of debentures, to be charges, not upon any specific property,⁵ but upon the undertaking as a whole, was authorized. By the second,⁶ creditors, both secured and unsecured, were prohibited from levying execution upon the property of a railroad,⁷ but permitted to apply for the appointment of a receiver. The statute then pointed out the manner in which the receiver was to apply such funds as should come to his hands. Consequently, English railroad reorganizations have been conducted ever since with little litigation. Pending reorganization, the court, through a receiver, will manage a distressed railroad and pay all running expenses. If necessary, it will borrow money to do this and make the loan a first lien upon the whole undertaking. There is no legal objection to granting this prior lien, for the lien of the debenture-holders does not attach to more than the net income.⁸ If the railroad is sold the debenture-holders can claim only the residue of the fund left in the hands of the receiver after the costs of the receivership and the sums borrowed by the court have been deducted.

But in America every step towards this enlightened position has been vigorously contested. At first the courts were averse to appointing a receiver at all,⁹ but this opinion has slowly given way until to-day, as in England, a railroad may itself, even before default, apply for a receiver.¹⁰ When, having granted a receivership, the early courts were pressed by the mortgagees, claiming their "vested rights," they fortified themselves behind the doctrine that in applying to them for this peculiar relief, the mortgagees must be taken to have assented to whatever conditions the courts might choose to impose.¹¹ This doctrine furnished a basis for so-called "preferential claims." Wages, past as well as present, supplies, and necessary repairs were brought within this definition.¹² Opinion has so far progressed, however, that to-day these claims will be recognized even though the mortgagee did not apply for the receivership.¹³ The most determined stand, however, was taken by

² Three legislatures have, however, passed statutes. GEN. STAT. VT., 1870, 924; 1 N. J. REV. STAT., 1877, § 106, p. 196; OH. LAWS, 1872, §§ 1, 3, 4, p. 31.

³ See 1 WYMAN, PUBLIC SERVICE CORPORATIONS, § 352.

⁴ COMPANIES CLAUSES CONSOLIDATION ACT, 1845 (8 & 9 VICT. c. 16).

⁵ *In re Hull, etc. Ry. Co.*, 40 Ch. D. 119.

⁶ THE RAILWAY COMPANIES ACT, 1867 (30 & 31 VICT. c. 127). *In re Eastern & Midlands Ry. Co.*, 45 Ch. D. 367.

⁷ Lord Cairns likens a going concern to a fruit-bearing tree. The security holders may take the fruit (the net income) as it ripens, but they must not be permitted to destroy the tree. See *Gardner v. London, etc. Ry. Co.*, L. R. 2 Ch. 201, 217.

⁸ For a discussion of the nature of debentures, see 24 HARV. L. REV. 389.

⁹ See *Meyer v. Johnston*, 53 Ala. 237, 337.

¹⁰ For an argument urging the older view, see 10 HARV. L. REV. 139.

¹¹ *Fosdick v. Schall*, *supra*.

¹² To determine what are preferential claims an analogy has at times been taken from the admiralty law. See *Farmers Loan & Trust Co. v. Kansas City, etc. R. Co.*, 53 Fed. 182, 190. See CALDWELL, RAILROAD RECEIVERS, 17.

¹³ "A railroad mortgagee . . . impliedly agrees that the current debts of a railroad

the mortgagees against allowing priority to receiver's certificates, but apparently with little result, for an analysis of the cases seems to show that where the proceeds of the sale of the certificates were to be used to pay priority claims, the certificates themselves will be given priority.¹⁴ It does not appear whether this can be explained on the doctrine of subrogation or not. A recent case decides that when the proceeds have been used in paying the coupons of the bonds that were secured by the mortgage, the certificates will then also be given preference. *American Trust Co. v. Metropolitan Steamship*¹⁵ Co., 190 Fed. 113 (C. C. A., First Circ.). This can hardly be explained as subrogation, for the coupon-holders would only have been entitled to share in the final distribution on the same terms as the bondholders.¹⁶ But by extending the doctrine of priority claims to include all expenses incurred in preserving the property, as well from the claims of mortgagees as from physical destruction,¹⁷ this decision, according as it does with the current of authorities, can be satisfactorily explained. Thus, without the aid of legislation, and despite our bankruptcy rule,¹⁸ America has nearly reached the satisfactory position long since attained by England.

REVIEW OF ORDERS IN HABEAS CORPUS PROCEEDINGS. — The weight of authority denies review by appellate courts of adjudications in *habeas corpus* proceedings.¹ *Wisener v. Burrell*, 28 Okl. 546, 118 Pac. 999. Any logical explanation of this variation from the general policy of allowing litigants to bring their disputes before courts of review must be found in some substantial peculiarity of *habeas corpus* proceedings. The explanation cannot be that such proceedings present no reviewable questions.² For upon *habeas corpus*, questions dealing with the jurisdiction of courts,³ the validity of ordinances,⁴ and the construction⁵ and constitutionality⁶ of statutes may be raised. Nor can the doctrine be justified on any of the procedural grounds proposed by the decisions.

company contracted in the ordinary course of its business shall be paid out of current receipts before he has any claim upon such income." See *Southern R. Co. v. Carnegie Steel Co.*, 176 U. S. 257, 285, 20 Sup. Ct. 347, 358.

¹⁴ *Wallace v. Loomis*, 97 U. S. 146; *Miltenberger v. Longansport Ry. Co.*, 106 U. S. 286, 1 Sup. Ct. 140; *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. 809.

¹⁵ No distinction has been made in the cases between a steamship company and a railroad. *Whelan v. Enterprise Transportation Co.*, 175 Fed. 212. See *Trust Co. v. Chapman*, 208 U. S. 360, 28 Sup. Ct. 406 (Canal Co.).

¹⁶ *Newbold v. P. & S. R. Co.*, 5 Ill. App. 367.

¹⁷ Lurton, J.: "I do not think that the duty of preserving the property in charge of the receivers is limited to a mere preservation of the physical structure of the railroad." See *Lloyd v. Chesapeake, etc. R. Co.*, 65 Fed. 351, 358.

¹⁸ See 1 WYMAN, PUBLIC SERVICE CORPORATIONS, § 352, n. 1.

¹ No distinction has been made between review at common law, by writ of error, and under general statutes allowing appeals.

² See *Cox v. Hakes*, 15 App. Cas. 506, 523.

³ *In re Bonner*, Petitioner, 151 U. S. 242, 14 Sup. Ct. 323.

⁴ *In re Garfinkle*, 37 Wash. 650, 80 Pac. 188.

⁵ *In re Authers*, 22 Q. B. D. 345.

⁶ *Medley*, Petitioner, 134 U. S. 160, 10 Sup. Ct. 384.

The first of these, found in the early English *dicta* which gave rise to the doctrine, is that adjudications in *habeas corpus* proceedings lack the technical requisites of reviewable judgments.⁷ It is questionable whether this reasoning is even technically sound.⁸ Some of the American cases suggest that a party defeated in a *habeas corpus* suit can bring similar proceedings before other judges.⁹ But this lacks the true nature of an appeal,¹⁰ and it is nowhere suggested that in the absence of statute a court of review can issue writs of *habeas corpus*. A third justification, that *habeas corpus* proceedings are before judges, and that the statutes allowing appeals relate only to proceedings before courts,¹¹ is proposed by but few of the cases, and instances a refinement of technicality.

The substantial reasoning to be found in the decisions rests upon the doctrine underlying the writ of *habeas corpus*, namely, the need of a speedy adjudication of a person's right to the custody of an infant or to liberation from illegal imprisonment. This doctrine can best be tested by dividing the orders in *habeas corpus* proceedings into those discharging a prisoner, remanding him, and awarding the custody of infants. As to the first class, the principle that a party be not concluded by the decision of an inferior court, and the principle directing the summary liberation of one under illegal imprisonment clash. The latter would be violated by a review the pendency of which stayed the order of discharge. The former would not be satisfied by a review which did not operate as a *supersedeas*, because the resulting possible absence of the discharged prisoner might defeat any relief given by the court of review. The greater importance of the *habeas corpus* principle justifies the disallowance of review of orders of discharge.¹² The opposite should be true as to orders remanding the petitioner.¹³ The need for a summary remedy here necessitates the interposition of the appellate court. For though the prisoner might get the same kind of relief on review of the ordinary proceeding under which he was imprisoned as on review of the *habeas corpus* suit, the earlier conclusion of the latter would result in its earlier review. Furthermore, the imprisonment may be under no proceeding whatever. Orders awarding the custody of infants present a similar situation.¹⁴ Effect can be given to a decree of reversal, for the

⁷ See *City of London's Case*, 8 Coke 121 b, *127 b; *King v. Dean and Chapter of Trinity-Chapel*, 8 Mod. *27, *29, 1 Str. 536, 537, 542. But see *Regina v. Paty*, 2 Salk. 503, 504.

⁸ See Co. Lit. 288 b.

⁹ See *Coston v. Coston*, 25 Md. 500, 506. Before THE HABEAS CORPUS ACT, 1640 (16 CHAS. 1, c. 10), not even this was true. See *Thomas Rudyard's Case*, 2 Vent. 22, 24; 3 BL. COMM. 131.

¹⁰ See *Cox v. Hakes*, *supra*, 523.

¹¹ See *Weddington v. Sloan*, 15 B. Mon. (Ky.) 147, 153; *Guilford v. Hicks*, 36 Ala. 95, 96.

¹² By writ of error: *Hammond v. People*, 32 Ill. 446; *Coston v. Coston*, *supra*. By appeal: *Weddington v. Sloan*, *supra*; *State v. Miller*, 97 N. C. 451, 1 S. E. 776. *Contra*, *State ex rel. Keyes v. Buckham*, 29 Minn. 462, 13 N. W. 902; *Winnovich v. Emery*, 33 Utah 345, 93 Pac. 988.

¹³ By writ of error: *Yates v. People*, 6 Johns. (N. Y.) 337. *Contra*, *Wade v. Judge*, 5 Ala. 130; *Ex parte Thompson*, 93 Ill. 89. By appeal: *Barriere v. State*, 142 Ala. 72, 39 So. 55. *Contra*, *Bell v. State*, use of *Miller*, 4 Gill (Md.) 301; *Howe v. State*, 9 Mo. 600.

¹⁴ By writ of error: *Contra*, *Wilkinson v. Murphy*, 20 Ala. 104. By appeal: *Queen v. Barnardo*, [1891] 1 Q. B. 194. *Contra*, *Ferguson v. Ferguson*, 36 Mo. 197.

court of review can retain control over the infant.¹⁵ Here the need for summary relief is not so great, and the case will be rare where the requirement of security from the prevailing party will prevent his obtaining the infant. The general disregard of any distinction such as that suggested above¹⁶ has resulted in a denial of review of any order in *habeas corpus* proceedings.

ELECTION OF REMEDIES BY SELLER IN CONDITIONAL SALE. — Like other contracts, a contract for a conditional sale depends for its interpretation on the reasonable intent of the parties. The intent of the parties to such a contract seems most completely analogous to the intent of the parties in a mortgage contract.¹ The buyer, as the mortgagor, is to have the complete beneficial use of the property, including even the right to transfer possession and enjoyment of it by sale or mortgage;² while the seller, as the mortgagee, is to retain the legal title, merely as security to insure the payment of the purchase price.

The failure to follow this analogy, however, has led in most jurisdictions to the doctrine that in case of default by the buyer, the seller has the choice of two inconsistent alternative remedies and by certain acts, which manifest his intention to rely on one remedy, he is considered as waiving his right to the other. For example, suing for the price is usually held such an election as to vest title in the buyer and to preclude the seller from reclaiming the property.³ On the other hand, reclaiming the property usually precludes him from suing for the price.⁴ The ordinary doctrine of election of remedies is applied. But it is submitted that what is contracted for is not inconsistent alternative remedies but concurrent remedies, the very purpose of one of which is to insure the enforcement and satisfaction of the other.⁵ Furthermore, to say that by election on the part of the seller title is passed to the buyer seems contrary⁶ to the ordinary rules for transfer of title which require mutual assent by the buyer and seller to some specified act of appropriation. The only act of appropriation agreed upon in such a contract is the discharge of

¹⁵ See *Queen v. Barnardo*, *supra*, 214.

¹⁶ See *Yates v. People*, *supra*, 432. But see *Cox v. Hakes*, *supra*, 535.

¹ *Chicago Ry. Equipment Co. v. Merchants' National Bank of Chicago*, 136 U. S. 268, 10 Sup. Ct. 999. See WILLISTON, SALES, § 330.

² *Carpenter v. Scott*, 13 R. I. 477; *Ames Iron Works v. Richardson*, 55 Ark. 642, 18 S. W. 381.

³ Recovering judgment is a binding election although this is not satisfied. *Crompton v. Beach*, 62 Conn. 25, 25 Atl. 446; *Ramey v. Smith*, 56 Wash. 604, 106 Pac. 160. So also is merely commencing a suit which is discontinued. *Orcutt v. Rickenbrodt*, 42 N. Y. App. Div. 238, 59 N. Y. Supp. 1008; *Frisch v. Wells*, 200 Mass. 429, 86 N. E. 775.

⁴ *Minneapolis Harvester Works v. Hally*, 27 Minn. 495, 8 N. W. 597; *Nashville Lumber Co. v. Robinson*, 91 Ark. 319, 121 S. W. 350.

⁵ "Just as the mortgagee may sue for the price and also foreclose his mortgage upon the property, so the seller in a conditional sale should be allowed to sue for the price and also reclaim the property, not as his own, but for the purpose of foreclosing it; . . ." WILLISTON, SALES, § 571, n. 39. See also Judge Sanborn's opinion in *Manson v. Dayton*, 153 Fed. 258, 272.

⁶ *Bierce, Ltd. v. Hutchins*, 205 U. S. 340, 346, 27 Sup. Ct. 524, 525.

the debt by the buyer. Those decisions, therefore, which do not so readily construe various acts of the seller as a binding election are preferable.⁷

But even where a doctrine of election obtains, the result reached in a recent case seems extreme and unwarranted. *Winton Motor Carriage Co. v. Broadway Automobile Co.*, 118 Pac. 817 (Wash.). The court holds that the mere transfer, as security for a loan, of the note given for the price in a contract for a conditional sale is such an election by the seller as to pass title immediately to the buyer. This decision seems to be contrary to well-settled principles of law in regard to the assignment of secured debts, as well as to the intent of the parties in the particular case. The law is well settled that the assignment of a debt carries with it a right to the security.⁸ In like manner the assignment of the seller's claim for the purchase price in a conditional sale whether as a chose in action⁹ or in the form of a promissory note¹⁰ carries with it the right to the seller's interest in the property. The reasonable intent of the parties in this particular case, moreover, would seem to be that, since the bank as assignee was taking the note as security for a loan, it was to have all the security possible, connected with the note. The true consequence of the transfer of the note, therefore, it is submitted, was the vesting in the assignee of the right to the property, as security¹¹ rather than an abnormal springing of the title to the buyer.

CONTRIBUTORY NEGLIGENCE AS DEFENSE TO ACTIONS BASED ON STATUTES. — The general rule is that where a legal duty is imposed by statute, an action may be maintained for an injury caused by a breach of such duty by any individual for whose benefit the statute was enacted.¹ This right of action exists even if the statute does not provide

⁷ Suing for the price is not a binding election. *Forbes Piano Co. v. Wilson*, 144 Ala. 586, 39 So. 645; *Campbell Printing Press & Mfg. Co. v. Rockaway Pub. Co.*, 56 N. J. L. 676, 29 Atl. 681. Nor is taking a chattel mortgage on the property. *First National Bank of Corning v. Reid*, 122 Ia. 280, 98 N. W. 107. Nor is filing a lien claim. *Bierce, Ltd. v. Hutchins*, *supra*. Nor is an attempt to enforce a mechanic's lien. *Warner Elevator Mfg. Co. v. Capitol Investment, Building & Loan Association*, 127 Mich. 323, 86 N. W. 828.

⁸ Where the security is a mortgage on land. See *JONES, MORTGAGES*, 6 ed., § 817 and cases cited in note. Where the security is a chattel mortgage. *Gould v. Marsh*, 1 Hun (N. Y.) 566. See *JONES, CHATTEL MORTGAGES*, 4 ed., § 503.

⁹ *Bank of Little Rock v. Collins*, 66 Ark. 240, 50 S. W. 694; *Cutting v. Whittemore*, 72 N. H. 107, 54 Atl. 1098.

¹⁰ *Kimball Co. v. Mellon*, 80 Wis. 133, 48 N. W. 1100; *Ross-Meehan, etc. Co. v. Pascagoula Ice Co.*, 72 Miss. 608, 18 So. 364; *Spoon v. Frambach*, 83 Minn. 301, 86 N. W. 106. *Contra*, *Merchants' & Planters' Bank v. Thomas*, 69 Tex. 237, 6 S. W. 565. The fact that the conditions of the sale did not appear on the face of the note is no reason for an exception since the security usually passes with the note even if the assignee did not know of its existence. See *JONES, MORTGAGES*, 6 ed., § 817.

¹¹ It would probably be held in most jurisdictions that the assignee acquired not the legal title but an equitable right to the security, and that the assignor held the legal title in trust for the assignee. *McPherson v. Acme Lumber Co.*, 70 Miss. 649, 12 So. 857.

¹ *Ives v. Welden*, 114 Ia. 476, 87 N. W. 408; *Couch v. Steel*, 3 E. & B. 402. See *COM. DIG. TIT. ACTION UPON STATUTE*, (A. 1); *BISHOP, NON-CONTRACT LAW*, § 132.

for a civil suit for damages.² The theory is that of an action on the case for negligence. The statute simply declares a certain act or omission to be "negligence *per se*."³

When contributory negligence as a defense to a statutory cause of action is involved, the decisions are not in perfect harmony. In two cases, however, the rule is uniform. First, where the statute declares a certain act or omission illegal, but is silent as to the civil remedy for violation thereof, contributory negligence will bar recovery, as in an ordinary action for negligence.⁴ Second, it is equally well settled that nothing but fraud on the plaintiff's part will defeat the action, when the statute in terms eliminates the defense of contributory negligence.⁵

Where the statute not only creates a duty, but specifically provides that anyone failing in such duty shall be answerable in damages for any injury caused thereby, at the same time being silent as to the effect of contributory negligence, no one rule can be formulated which will apply to every case. The matter becomes one of statutory construction, and a consequent confusion exists among the authorities. In the great majority of cases the courts have discovered no intent to abrogate the common-law rule, but merely a desire to relieve the plaintiff from the burden of showing a want of reasonable care. The commonest instance is where a railroad omits the statutory signals on approaching a crossing.⁶ To the large mass of similar cases⁷ may be added a recent case involving the liability for an injury caused by an explosion of oil, which was sold in violation of a statute. The court held that the plaintiff was barred by his own negligence. *Morrison v. Lee*, 133 N. W. 548 (N. D.). On the other hand, the subject matter or phraseology of statutes have led the courts in at least three sorts of cases to reach an opposite result. Certain statutes of Illinois enacted in compliance with the state constitution to protect the lives of miners have been held to impose an absolute liability on the mineowner, if a wilful violation of the statutory duty results in injury.⁸ The subject matter,

In New York, violation of a statute is only *prima facie* evidence of negligence. *Knupfle v. Knickerbocker Ice Co.*, 84 N. Y. 488. Only those in whose favor the statute was enacted have a right of action. *McDonnell v. Pittsfield & North Adams R. Corp.*, 115 Mass. 564; *Williams v. Chicago & Alton R. Co.*, 135 Ill. 491, 26 N. E. 661.

² *Couch v. Steel*, *supra*; *Hayes v. Michigan Central R. Co.*, 111 U. S. 228, 4 Sup. Ct. 369.

³ *Carswell v. Mayor, etc., of Wilmington*, 2 Marv. (Del.) 360, 43 Atl. 169; *Ives v. Welden*, *supra*. See COOLEY, TORTS, 3 ed., 1408; 1 THOMPSON, COMM. ON THE LAW OF NEGLIGENCE, § 10.

⁴ *Queen v. Dayton Coal & Iron Co.*, 95 Tenn. 458, 32 S. W. 460; *Browne v. Siegel, Cooper & Co.*, 191 Ill. 226, 60 N. E. 815; *Caswell v. Worth*, 5 E. & B. 849.

⁵ *Quackenbush v. Wisconsin & Minnesota R. Co.*, 62 Wis. 411, 22 N. W. 519; *Colasurdo v. Central R. of New Jersey*, 180 Fed. 832; *Pulliam v. Illinois Central R. Co.*, 75 Miss. 627, 23 So. 359.

⁶ *Williams v. Chicago, Milwaukee & St. Paul Ry. Co.*, 64 Wis. 1, 24 N. W. 422; *Leak v. Georgia Pacific Ry. Co.*, 90 Ala. 161, 8 So. 245.

⁷ *Wadsworth v. Marshall*, 88 Me. 263, 34 Atl. 30; *Wohlfahrt v. Beckert*, 92 N. Y. 490; *Holum v. Chicago, Milwaukee & St. Paul Ry. Co.*, 80 Wis. 299, 50 N. W. 99.

⁸ *Carterville Coal Co. v. Abbott*, 181 Ill. 495, 55 N. E. 131; *Chicago-Coulterville Coal Co. v. Fidelity & Casualty Co. of New York*, 130 Fed. 957; *Western Anthracite Coal & Coke Co. v. Beaver*, 192 Ill. 333, 61 N. E. 335. It seems that the word "wilful" in the statute connotes no moral turpitude, but only a continued failure to comply with the statute. *Cf. Gully v. Smith*, 12 Q. B. D. 121.

reasons the court, discloses an intent to establish a new rule of public policy calculated to render this employment less menacing to human life. But this principle of construction seems to have had slight application beyond these cases. Another well-settled exception to the general rule is the absolute liability of railroads for fires caused by passing engines.⁹ This construction rests partially on the dangerous character of the business,¹⁰ and so is an illustration of the principle of the Illinois cases. But most reliance has been placed in the statutory provisions that the railroad shall have an insurable interest in the adjoining property.¹¹ Lastly, there is a long line of decisions holding railroads liable, in spite of the plaintiff's contributing carelessness,¹² for injury caused by the breach of a statutory duty to build fences or erect cattle guards. This rule is reiterated in another recent case. *Chapin v. Ann Arbor R. Co.*, 133 N. W. 512 (Mich.). These authorities proceed on the theory that such statutes are, in their nature, police regulations, for the protection, not only of persons and property along the route, but also of the passengers, whose safety can be insured only by offering the railroad some unusual inducement to keep its tracks clear.¹³

LEGALITY OF TRADE UNIONS AT COMMON LAW. — Most of the discussion to-day as to the rights of trade unions is concerned with the question of what acts a trade union can do, and what purposes it can effect without committing a legal wrong. But a recent English case raises the question whether a trade union, as such, is unlawful at common law. *Baker v. Ingall*, 132 L. T. J. 131 (Eng., C. A., Nov. 30, 1911). In a suit by a trade union against a member, relief was denied on the ground that the union was an illegal association.

In England, from the time of the earliest reported case¹ on trade unions until the acts of 1824-1825,² a union of employees formed for the purpose of increasing wages was regarded as a criminal conspiracy. The acts of 1825 and 1875³ freed trade unions from the fear of indictment, and those

⁹ *Mathews v. Missouri Pacific Ry. Co.*, 142 Mo. 645, 44 S. W. 802.

¹⁰ *Bowen v. Boston & Albany R. Co.*, 179 Mass. 524, 61 N. E. 141.

¹¹ *Rowell v. Railroad*, 57 N. H. 132; *Laird v. Railroad*, 62 N. H. 254; *Matthews v. St. Louis & San Francisco Ry. Co.*, 121 Mo. 298, 24 S. W. 591. In *Peter v. Chicago & West Michigan Ry. Co.*, 121 Mich. 324, 80 N. W. 295, the court went on the principle that *expressio unius est exclusio alterius*, as the only excuse provided in the statute was the use of safe engines. In *West v. Chicago & Northwestern Ry. Co.*, 77 Ia. 654, 35 N. W. 479, the court said the statute was intended to settle a vexed question in the law of contributory negligence by eliminating it as a defense.

¹² *Flint & Pere Marquette Ry. Co. v. Lull*, 28 Mich. 510; *Harwood's Admx. v. Bennington & Rutland Ry. Co.*, 67 Vt. 664, 32 Atl. 721.

¹³ See 2 THOMPSON, COMM. ON THE LAW OF NEGLIGENCE, § 2013. In *Kilpatrick v. Grand Trunk Ry. Co.*, 72 Vt. 263, 47 Atl. 827, the court said, by way of *dictum*, that the cattle-guard cases must be explained on the ground that the plaintiff's negligence in letting his animals stray was too remote. But, when it is remembered that the defendant's negligence consists, not in running down the animals, but in failing to erect cattle guards, this explanation seems scarcely plausible.

¹ *The King v. Journeyman-Tailors*, 8 Mod. *10.

² THE COMBINATION ACT, 1824 (5 GEO. 4, c. 95); THE COMBINATION ACT, 1825 (6 GEO. 4, c. 129).

³ THE CONSPIRACY AND PROTECTION OF PROPERTY ACT, 1875 (38 & 39 VICT. c. 86).

of 1871 and 1876⁴ legalized them for certain purposes, but they are still regarded as combinations in restraint of trade, and are, consequently, unable to enforce many of their rules and agreements.⁵ If an important by-law of a union be indeed in restraint of trade, this position is entirely logical, for the rules of an unincorporated association are enforceable solely on principles of contract,⁶ and, unless a contract be divisible,⁷ the illegality of part of the consideration renders the whole contract invalid.⁸ As to restraint of trade the English courts hold that any agreement by which the members are bound to obey their leaders' orders on trade matters is contrary to public policy.⁹ Since most of the trade unions' demands have been granted them by statute, the courts have not felt inclined to favor the unions in interpreting the common law.

The earliest cases in America followed the English law in holding unions to be criminal conspiracies.¹⁰ The courts soon came to feel, however, that laborers who combined to further their legitimate interests ought not to be regarded as criminals.¹¹ Having declared that combinations of workmen were not indictable, because not opposed to public policy, judges were naturally led to regard them as legal for all purposes.¹² It was evident, nevertheless, that unions, like all large combinations, might unduly oppress outsiders. Many courts have held, therefore, that the procuring by a union of the discharge of non-union men is a tort which equity will enjoin.¹³ Thus it is evident that, in many states, the common law still regards some of the ordinary purposes of labor unions as illegal.¹⁴ It might seem to follow that, where these purposes are expressed in the by-laws, the entire agreement of association between the members of an

⁴ THE TRADE UNION ACT, 1871 (34 & 35 VICT. c. 31); THE TRADE UNION ACT, 1876 (39 & 40 VICT. c. 22).

⁵ *Hornby v. Close*, L. R. 2 Q. B. 153. For those agreements which remain unenforceable to-day see THE TRADE UNION ACT, 1871, *supra*, § 4. The result of that act is that "the trade union is a lawful club, but a club of which the courts will not directly enforce the rules, *e. g.* as to payment of subscriptions and the like, as against any member." Professor A. V. Dicey in 17 HARV. L. REV., 527 note 2.

⁶ *Brown v. Stoerckel*, 74 Mich. 269, 41 N. W. 921. See *Levy v. Magnolia Lodge*, 110 Cal. 297, 309, 42 Pac. 387, 891.

⁷ It has been held that the benefit-society rules of a trade union cannot be separated from those which are in restraint of trade where there is no separate benefit fund and where a member may lose all the benefit advantages by the breach of a militant rule. *Russell v. Amalgamated Society of Carpenters and Joiners*, [1910] 1 K. B. 506. But it has been decided that where the general objects of a union are legal, minor unlawful by-laws will not make it an illegal body. *Swaine v. Wilson*, 24 Q. B. D. 252.

⁸ *Haynes v. Rudd*, 102 N. Y. 372, 7 N. E. 287; *Stewart v. Thayer*, 168 Mass. 519, 47 N. E. 420.

⁹ *Rigby v. Connol*, 14 Ch. D. 482; *Russell v. Amalgamated Society of Carpenters and Joiners*, *supra*.

¹⁰ *Trial of Journeymen Boot and Shoemakers of Philadelphia* (Pamphlet); *People v. Melvin*, 2 Wheeler Cr. Cas. (N. Y.) 262.

¹¹ *Commonwealth v. Hunt*, 4 Met. (Mass.) 111. This result has been reached by statute in some states, for example Pennsylvania. PURDON, DIG., 13 ed., 4807, § 1.

¹² *Snow v. Wheeler*, 113 Mass. 179; *Master Stevedores Association v. Walsh*, 2 Daly (N. Y.) 1.

¹³ *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011; *Erdman v. Mitchell*, 207 Pa. St. 79, 56 Atl. 327. *Contra*, *National Protective Association v. Cumming*, 170 N. Y. 315, 63 N. E. 369.

¹⁴ American courts do not, however, regard as illegal an agreement by members of a union to obey an order to strike. See *Thomas v. Cincinnati, etc. Ry. Co.*, 62 Fed. 803, 817.

unincorporated union should be held to be, in legal effect, a contract no part of which can be enforced. Many American unions, however, are incorporated,¹⁵ and by corporation law a by-law which is in restraint of trade is merely void and does not render the corporation illegal.¹⁶ Our courts generally apply the same rule to unincorporated unions. The question usually arises in suits brought by those who have been improperly expelled from labor unions.¹⁷ The courts rarely go into the question of the legality of the by-laws, except to decide that a member expelled for violating an illegal by-law can be reinstated.¹⁸ Thus the courts distinguish between the association and its illegal regulations. At least one decision, however, refuses reinstatement on the ground that the union is an illegal body.¹⁹ This decision may be technically correct, but, according to the American view of restraint of trade, the main objects of a union are rarely illegal, and therefore, even by the English doctrine, the union itself would be held a legal body. Furthermore, the suggested distinction between incorporated and unincorporated unions seems undesirable.

RECENT CASES.

AGENCY—NATURE AND INCIDENTS OF RELATION—AGENT ACTING FOR TWO PRINCIPALS: EFFECT OF HIS MISREPRESENTATIONS. — The defendant authorized his agent to sell real estate on commission, and the latter sold it to the plaintiff, acting also as her agent in the transaction. Both parties consented to this double agency; but the plaintiff's signature was obtained by the fraudulent misrepresentations of the agent as to the terms of the contract. Held, that the plaintiff cannot rescind. *Austin v. Rupe*, 141 S. W. 547 (Tex., Ct. Civ. App.).

An agent may represent both parties in a transaction between them, if they have full knowledge of the circumstances. *Adams Mining Co. v. Senter*, 26 Mich. 73. But this relation is looked upon with suspicion, and if he is subsequently fraudulent, there is some authority for saying that the contract may be rescinded by either principal. See *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 529, 6 Sup. Ct. 837, 841. The same result may be reached otherwise here. Acts of the agent done in the scope of each employment must be attributed to each principal severally, and an action for the acts imputed to one would be barred by the same acts imputed to the plaintiff. *Murdock v. Clarke*, 90 Cal. 427, 27 Pac. 275; *Nevada Nickel Syndicate, Ltd. v. National Nickel Co.*, 96 Fed. 133, 147. Cf. *Brown v. St. John Trust Co.*, 71 Kan. 134, 80 Pac. 37. But where the common agent makes fraudulent misrepresentations to one principal, he cannot be acting in the scope of his authority from that principal. For the agent must be looking entirely to his own interest, or that of the other principal, in a matter in which third parties are not concerned. *Allen v.*

¹⁵ See *Cotton Jammers' and Longshoremen's Association v. Taylor*, 23 Tex. Civ. App. 367, 56 S. W. 553.

¹⁶ See *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 454, 56 N. E. 822, 826.

¹⁷ *Corregan v. Hay*, 94 N. Y. App. Div. 71, 87 N. Y. Supp. 956.

¹⁸ *Schneider v. Local Union No. 60*, 116 La. 270, 40 So. 700. Cf. *Huston v. Rentlinger*, 91 Ky. 333, 15 S. W. 867.

¹⁹ *Froelich v. Musicians Mutual Benefit Association*, 93 Mo. App. 383. The union was held illegal at common law as well as by statute. See also *Brennan v. United Hatters*, 73 N. J. L. 729, 739, 65 Atl. 165, 169.

South Boston R. Co., 150 Mass. 200, 22 N. E. 917. See *Ryan v. World Mutual Life Ins. Co.*, 41 Conn. 168, 171. But cf. *Blair v. Baird*, 43 Tex. Civ. App. 134, 94 S. W. 116. On this ground the courts refuse to attribute the knowledge of the agent to his principal, when its concealment is to the personal interest of the agent. *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552. See *Kettlewell v. Watson*, 21 Ch. D. 685, 707. But the defendant may be liable for his agent's acts, because the misrepresentations are made to a third party. *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259.

ASSIGNMENTS FOR CREDITORS — RIGHTS OF CREDITORS — PROOF OF COSTS IN JUDGMENT OBTAINED AFTER ASSIGNMENT. — After an assignment for the benefit of creditors, directing the assignee to pay "all the debts and liabilities now due or to grow due," the plaintiff recovered a judgment against the assignor for a conversion which had occurred before the assignment. *Held*, that the entire judgment, including costs and interest, is provable. *Matter of Whitney*, 146 N. Y. App. Div. 45.

The decision as to the costs should not be rested on the words "to grow due" in the assignment, since they require no wider interpretation than will make them apply to claims not yet payable, though already in existence. In the absence of express words in the assignment, only claims incurred before the assignment are provable. *Weinmann and Co.'s Estate*, 164 Pa. St. 405, 30 Atl. 389. Cf. *Dean and Son's Appeal*, 98 Pa. St. 101. The reduction to judgment, however, of a claim incurred before the assignment does not so change it as to deprive the creditor of his right to prove it. *Second National Bank v. Townsend*, 114 Ind. 534, 17 N. E. 116. Moreover, a judgment is conclusive on the assignee, as the privy of the debtor, with regard to the amount of the indebtedness established thereby. *Matter of Roberts*, 98 N. Y. App. Div. 155, 90 N. Y. Supp. 731; *Merchants' National Bank v. Hagemeyer*, 4 N. Y. App. Div. 52, 38 N. Y. Supp. 626. The only exceptions ordinarily allowed are in cases of judgments obtained by fraud or collusion. See *Ludington's Petition*, 5 Abb. N. C. (N. Y.) 307, 322. But see *Garland v. Rives*, 4 Rand. (Va.) 282, 316. These being absent in the present case, the result reached would seem to be correct. A contrary view, however, has been taken in at least one state. *Assigned Estate of Jamison*, 163 Pa. St. 143, 29 Atl. 1001. But cf. *Pittsburgh and Steubenville R. Co.'s Appeal*, 2 Grant (Pa.) 151.

ATTORNEYS — RELATION BETWEEN ATTORNEY AND CLIENT — COLLUSIVE DISCONTINUANCE BY CLIENT. — A., having employed B. for a contingent fee to sue C., made a collusive settlement with C., after a verdict for the plaintiff and motion for a new trial, to defeat B.'s fee. B. brought a bill in equity to restrain C. from using the agreement to procure a dismissal of the action. *Held*, that the bill will not lie, since in the trial at law B. can proceed to final judgment for his own benefit. *Burkhart v. Scott*, 72 S. E. 784 (W. Va.).

A valid contract for the payment of a contingent fee does not give the attorney such an interest in the cause of action as to prevent the plaintiff from compromising the suit. *Coughlin v. New York, etc. R. Co.*, 71 N. Y. 443; *Wright v. Wright*, 70 N. Y. 96. It is also clear that although an attorney has a lien for his costs on a judgment that has been obtained, he has none on the cause of action itself. *Hanna v. Island Coal Co.*, 5 Ind. App. 163, 31 N. E. 846. See *Sandberg v. Victor Gold and Silver Mining Co.*, 18 Utah 66, 76, 55 Pac. 74, 77. Where by statute a lien is given on the cause of action, it has been held that, upon the settlement of a case, the attorney, by obtaining leave of court, can prosecute the suit to judgment for his own benefit. *Manning v. Manning*, 61 Ga. 137; *Coleman v. Newsome*, 58 Ga. 132. At common law, however, this right appears to be limited to cases of collusive settlements. See *Randall v. Van Wagenen*, 115 N. Y. 527, 531-532. In these cases, the right would seem

to be eminently desirable for the protection of attorneys, and it is quite commonly allowed. *Jones v. Morgan*, 39 Ga. 310; *Pilkington v. Brooklyn Heights R. Co.*, 49 N. Y. App. Div. 22, 63 N. Y. Supp. 211. It has sometimes been thought that its existence is an anomaly. See *Coughlin v. New York, etc. R. Co.*, *supra*, 448. It is submitted, however, that it can be justified by reference to the summary or equitable jurisdiction possessed by common-law courts to prevent an abuse of their authority. See SMITH, ACTION AT LAW, 10 ed., 20-23.

BANKRUPTCY — PROPERTY PASSING TO TRUSTEE — BANKRUPT'S TITLE IN CAUSE OF ACTION BEFORE APPOINTMENT OF TRUSTEE. — A voluntary bankrupt brought suit against the defendant after filing the petition, but before the election of a trustee. *Held*, that the defendant may not defeat the suit by showing the pendency of the bankruptcy proceedings. *Johnson v. Collier*, U. S. Sup. Ct., Jan. 9, 1912.

Though authorities are few, the better opinion seems to be that the title to the bankrupt's property after the adjudication and prior to the election of a trustee is not *in custodia legis*, but is defeasibly vested in the bankrupt. See 20 HARV. L. REV. 411; 21 *id.* 531; 25 *id.* 79.

BANKRUPTCY — SET-OFF — DEBT OF BANKRUPT AND DEBT OF CREDITOR TO TRUSTEE. — A trustee in bankruptcy sued on a claim for services rendered by him as trustee. The defendant set up a counterclaim for the failure of the bankrupt to perform a contract. This failure had occurred subsequently to the bankruptcy. The Bankruptcy Act, § 68, allows set-offs in "cases of mutual debts or mutual credits;" the set-off against the bankrupt must be a provable claim. *Held*, that the set-off should not be allowed. *Howard v. Magazine & Book Co.*, 131 N. Y. Supp. 916 (App. Div.).

Mutual debts must be in the same right. *Wright v. Rogers*, 3 McLean (U. S.) 229; *Bausman v. Kinnear*, 79 Fed. 172. The trustee in bankruptcy acts in a dual capacity, representing the creditors and the bankrupt. Rights and obligations passing to him from the bankrupt are in the interest of the bankrupt; obligations incurred by him subsequently, in that of the creditors. Obligations of the latter kind must be settled in full, whereas the bankrupt's creditors obtain only a dividend. The debts are clearly in different rights, and it would be unfair to give one creditor full payment, merely because he became indebted to the trustee. The English law under like statutes is in accord. *Alloway v. Steere*, 10 Q. B. D. 22; *West v. Pryce*, 2 Bing. 455. The converse of the principal case should be similarly decided. But see *In re Crystal Spring Bottling Co.*, 100 Fed. 265. The case suggests the further question whether a claim on an executory contract is provable at all. See BANKRUPTCY ACT OF 1898, § 68. If the contract is unilateral, it should be, for there is a fixed liability of the bankrupt to perform; but when it is an assignable bilateral contract, there is a contingency that the trustee will elect to make it his own and not the bankrupt's, and the provability of contingent claims is doubtful. See 23 HARV. L. REV. 636.

BANKRUPTCY — VOLUNTARY PROCEEDINGS — DISTRIBUTION OF SURPLUS. — After the principal of all approved claims against a voluntary bankrupt's estate was paid in full, together with interest to the date of filing of the petition, a large surplus remained in the hands of the trustee. *Held*, that those who held approved claims are entitled to interest accruing on them after the filing of the petition. *Johnson v. Norris*, 190 Fed. 459 (C. C. A., Sixth Circ.).

Under the present bankruptcy act, insolvency is not a requisite to filing a voluntary petition. BANKRUPTCY ACT OF 1898, § 4 *a*. See 1 REMINGTON, BANKRUPTCY, § 42; COLLIER, BANKRUPTCY, 8 ed., 96. But the act makes

no provision for the disposition of a surplus remaining after all debts of the bankrupt are paid in full. Therefore, as to such a surplus, the court is remitted to ordinary equitable principles, and it is equitable that the bankrupt should get the surplus only after the trustee has paid the creditors the interest on their claims up to the date of payment. A similar result was reached under the Act of 1867, under a former English act, and under several state insolvency laws. *In re Hagan*, Fed. Cas., No. 5898; *Bromley v. Goodere*, 1 Atk. 75; *Williams v. American Bank*, 45 Mass. 317. In the only other case involving the distribution of a surplus under the present act, this point seems to have been assumed. *Re Osborn's Sons & Co.*, 177 Fed. 184.

CARRIERS — PERSONAL INJURIES TO PASSENGERS — DUTY TO PROTECT FROM ARREST. — The plaintiff was a passenger in a sleeping car on the defendant's train. Public officers, having information that a person suspected of having committed murder in Indiana was in the berth occupied by the plaintiff, boarded the train in New York, and showed their police badges to the conductor, who pointed out the plaintiff's berth. The plaintiff was arrested without a warrant and removed from the train, but was released the following day. *Held*, that the defendant is not liable. *Burton v. New York, etc. R. Co.*, 46 N. Y. L. J. 1287 (N. Y., App. Div., Dec., 1911).

Although the carrier is bound legally to use the highest degree of care practicable to protect passengers, it is not an insurer of their safety. *Boyce v. Anderson*, 2 Pet. (U. S.) 150; *Wright v. Chicago, B. & Q. R. Co.*, 4 Colo. App. 102, 35 Pac. 196. The majority opinion in the principal case, proceeding on the ground that the arrest was valid, coincides with settled law that the carrier owes no duty to interfere with the lawful arrest of a passenger. See *Brunswick & Western R. Co. v. Pouder*, 117 Ga. 63, 43 S. E. 430, 431. It would seem that the carrier owes no greater duty of protection from unlawful arrest by officers having apparent authority. See *Duggan v. Baltimore & Ohio R.*, 159 Pa. St. 248, 255, 28 Atl. 182, 185. The carrier is not negligent in submitting to the demands of officers whose duty it is to enforce the laws. *Mayfield v. St. Louis, I. M. & S. Ry. Co.*, 97 Ark. 24, 133 S. W. 168. See 2 HUTCHINSON, CARRIERS, 3 ed., § 987. To hold otherwise would impose upon the carrier the precarious duty of passing on the right of a legal officer to make an arrest. *Bowden v. Atlantic Coast Line R. Co.*, 144 N. C. 28, 56 S. E. 558. The argument of the dissenting judge is based partly on the analogy of attachment of goods in the hands of the carrier, who is protected only if the process is valid. *Edwards v. White Line Transit Co.*, 104 Mass. 159. It is submitted that this ignores the distinction between the liability of the carrier of goods and that of the carrier of passengers.

CONFLICT OF LAWS — SITUS OF CHOSSES IN ACTION — ATTACHMENT OF STOCK CERTIFICATES. — The plaintiff brought an action in Kentucky and recovered judgment against the defendant A., a resident of New York. The plaintiff, in proceedings under a Kentucky statute, served a writ of attachment on the defendant B., a Delaware corporation having its principal office, its books, its plant, and all its assets in Kentucky. The attachment covered a certificate for stock transferred to B. by A. in fraud of creditors, and also stock, the certificate for which A. himself held in New York. *Held*, that the attachment is valid as to all the shares. *Bowman v. Breyfogle*, 140 S. W. 694 (Ky.).

As a corporation exists only at its domicile, its stock should be attachable there alone, irrespective of the location of the certificates. *Ireland v. Globe Milling and Reduction Co.*, 19 R. I. 180, 32 Atl. 921; *Christmas v. Biddle*, 13 Pa. St. 223; *Smith v. Downey*, 8 Ind. App. 179. Two courts, however, hold the contrary view, considering that stock certificates are now generally treated

as personal property. *Simpson v. Jersey City Contracting Co.*, 165 N. Y. 193, 58 N. E. 896; *Puget Sound National Bank v. Mather*, 60 Minn. 362, 62 N. W. 396. But this obscures the fundamental distinction between the property in the certificate itself and the interest in the corporation represented by it. *Moore v. Gennett*, 2 Tenn. Ch. 375. See 25 HARV. L. REV. 74. As to the New York shares the court held that the defendant corporation had become domesticated, thus making Kentucky the *situs* of its stock — a conclusion supported by one case in which statutes required the corporation to undergo certain domesticating processes before entering the state. *Young v. South Tredegar Iron Co.*, 85 Tenn. 189, 2 S. W. 202. The Kentucky provision that "stock in a corporation" is attachable hardly justifies this result, and similar provisions under almost identical circumstances have been held to cover only domestic corporations. *Plimpton v. Bigelow*, 93 N. Y. 592, reversing 29 Hun (N. Y.) 362; *Ireland v. Globe Milling and Reduction Co.*, *supra*. And although there appears no inherent prohibition on legislative enactment making the possibility of such attachment a condition precedent to the corporation's entering the jurisdiction, it is submitted that for reasons of comity and justice the court should construe this as covering only the property in the certificate itself.

CONTRIBUTORY NEGLIGENCE — STATUTORY ACTIONS — INTENT OF STATUTE TO ABROGATE DEFENSE. — A statute required railroads to erect cattle guards and provided that the railroad should be liable civilly for any injury to cattle or stock resulting from a failure to comply with the statute. *Held*, that contributory negligence is no defense to an action on the statute. *Chapin v. Ann Arbor R. Co.*, 133 N. W. 512 (Mich.).

A statute made it illegal to sell oil under 105° Fahrenheit test and provided that anyone violating the statute should be liable civilly for any injury caused by an explosion thereof. *Held*, that contributory negligence is a bar to recovery. *Morrison v. Lee*, 133 N. W. 548 (N. D.). See NOTES, p. 463.

CORPORATIONS — CORPORATIONS DE FACTO — LIABILITY OF DIRECTORS AS PARTNERS. — The plaintiff sold goods to the F. J. Pound Company, not knowing whether the company was a corporation or a partnership. The company had attempted incorporation but had failed because it had not filed articles of association with the county clerk. *Held*, that the plaintiff cannot recover from the directors as copartners. *Newcomb-Endicott Co. v. Fee*, 133 N. W. 540 (Mich.).

The principal case falls midway between two well-established cases. (1) Where one sells goods to a *de facto* corporation, reasonably believing it to be a partnership, he can hold the incorporators to an individual liability. *Guckert v. Hacke*, 159 Pa. St. 303, 28 Atl. 249. *Cf. Rust-Owen Lumber Co. v. Wellman*, 10 S. D. 122, 72 N. W. 89. (2) Where there has been dealing on a corporate basis with a *de facto* corporation, collateral attack will be denied. *Snider's Sons Co. v. Troy*, 91 Ala. 224, 8 So. 658. *Cf. Whitney v. Wyman*, 101 U. S. 392, 397. There is said to be a presumption of dealing on a corporate basis when a "corporate-sounding name" is used. *Allen v. Hopkins*, 62 Kan. 175, 61 Pac. 750. *Cf. Seymour v. Harrow Co.*, 81 Ala. 250, 1 So. 45. It is doubtful whether this presumption is warranted in all cases, since partnerships and even individuals lawfully may, and often do, use such names in business transactions. *Anderson v. Walsh*, 189 N. Y. 159, 81 N. E. 764. See LINDLEY, PARTNERSHIP, 7 ed., 107. The better rule would seem to be that where, as in the principal case, a seller does not consider whether he is dealing with a corporation or a partnership, the associates in order to escape individual liability should make out *de jure* incorporation. There is no argument *ad hominem* or reason of policy for confining the seller to an action against the *de facto* corporation. See 20 HARV. L. REV. 456, 471-474.

DECEIT — GENERAL REQUISITES AND DEFENSES — REPRESENTATIONS OF VALUE AS FACT. — The defendant induced the plaintiff to buy her hotel property by making representations, known to be false, that it was worth \$35,000 and was a "big paying proposition." In fact the property was worth about \$17,000. The plaintiff was particularly ignorant and inexperienced in business matters, as the defendant knew. The court charged that the plaintiff could recover if the misrepresentations were intended and understood by the parties as assertions of fact. *Held*, that this is not error. *Adan v. Steinbrecher*, 133 N. W. 477 (Minn.).

As a general rule misrepresentations of value are regarded as mere statements of opinion, "seller's talk," and not actionable. *Chrysler v. Canaday*, 90 N. Y. 272. But under some circumstances a statement ordinarily one of opinion may be a statement of fact. *Andrews v. Jackson*, 168 Mass. 266, 47 N. E. 412. So an action is allowed where the vendor has special means of knowledge which the vendee has not. *Shelton v. Healy*, 74 Conn. 265, 50 Atl. 742. Or where the value is difficult of ascertainment, and can be known only to an expert. *Picard v. McCormick*, 11 Mich. 68. Or where the defendant is in a position of trust or confidence. *Hauk v. Brownell*, 120 Ill. 161, 11 N. E. 416. See *Gustafson v. Rustemeyer*, 70 Conn. 125, 133, 39 Atl. 104, 106. Or where the vendor dissuades the vendee from making inquiries which would disclose the truth. *Nysewander v. Lowman*, 124 Ind. 584, 24 N. E. 355. Whether in a particular case the words are a statement of fact or of opinion must depend largely on the circumstances of the case, with the broad general principle that the law does not permit misrepresentations made with intent to deceive intending purchasers. *Cf. Watson v. Molden*, 10 Idaho 570, 582, 79 Pac. 503, 507. The principal case accords with the modern tendency to hold the doctrine of "seller's talk" inapplicable where the misrepresentation of value is made and acted on as an affirmation of fact. *Crompton v. Beedle*, 83 Vt. 287, 75 Atl. 331; *Helland v. Bilstad*, 140 Ia. 411, 118 N. W. 422.

EVIDENCE — CHARACTER — SPECIFIC ACTS TO SHOW CHARACTER OF DECEASED ON ISSUE OF SELF-DEFENSE. — Evidence was excluded that the deceased had said that he was a "desperado nigger" and had been sentenced to the state penitentiary. *Held*, that this is not error. *Coulter v. State*, 140 S. W. 719 (Ark.).

When there is some evidence of self-defense, the violent character of the deceased, even if unknown to the defendant, may probably be used to show who was the aggressor. See 1 WIGMORE, EVIDENCE, § 63. Threats by the deceased may also be used for this purpose. *Wilson v. State*, 30 Fla. 234, 11 So. 556; *State v. Turpin*, 77 N. C. 473. But particular acts of violence should not be admissible for this purpose unless closely connected with the act charged. *People v. Gaimari*, 176 N. Y. 84, 68 N. E. 112; *State v. Sale*, 119 Ia. 1, 92 N. W. 680. But *cf. State v. Beird*, 118 Ia. 474, 92 N. W. 694. When the issue of self-defense is raised and the accused knew of the violent character of the deceased, this may be used to show that the former acted under the apprehension of danger. *Monroe v. State*, 5 Ga. 85, 137; *Horlock v. State*, 43 Tex. 242. Threats by the deceased known to the accused may also be used for this purpose. *Powell v. State*, 52 Ala. 1; *State v. Burton*, 63 Kan. 602, 66 Pac. 633. As to whether specific acts of violence by the deceased known to the accused may be admitted for this purpose, authorities differ. *People v. Harris*, 95 Mich. 87, 54 N. W. 648; *People v. Thomas*, 67 N. Y. 218; *Alexander v. Commonwealth*, 105 Pa. St. 1. But since there is no allegation in the principal case that the defendant knew of the facts excluded, the decision seems sound. Nor do the statements show the mental attitude of the deceased in regard to the crime charged sufficiently to claim admission on that ground. *Cf. Commonwealth v. Trefethen*, 157 Mass. 180, 31 N. E. 961.

EVIDENCE — PROOF OF FOREIGN LAW — APPLICATION OF LEX FORI. — The plaintiff brought an action to recover for personal injuries suffered in Cuba through the defendant's negligence. There was no evidence of Cuban law. *Held*, that the plaintiff is not entitled to recover. *Cuba R. Co. v. Crosby*, U. S. Sup. Ct., Jan. 9, 1912.

The court holds that the law of the forum should not be applied, since there is no general presumption that the Cuban law is the same as the common law. This decision reverses the decision in the Circuit Court of Appeals, criticized in 23 HARV. L. REV. 64.

EXECUTION — REMEDY OF BONÂ FIDE PURCHASER OF PROPERTY TO WHICH JUDGMENT DEBTOR HAS NO TITLE. — The sheriff sold on execution two horses which were not the property of the judgment debtor. The owner successfully replevied the horses from the *bonâ fide* purchaser. *Held*, that the purchaser may recover from the judgment creditor in an action for money had and received. *Dresser v. Kronberg*, 81 Atl. 487 (Me.).

The doctrine of *caveat emptor*, admittedly applicable to execution sales, has appeared to text writers to be inconsistent with any right of recovery by the purchaser, even though he acquires absolutely no title. See FREEMAN, VOID JUDICIAL SALES, 4 ed., § 49; KLEBER, VOID JUDICIAL AND EXECUTION SALES, § 469. However, recovery from the judgment debtor is commonly allowed on the ground that the purchaser has paid money to the debtor's use by discharging his debt. *Julian v. Beal*, 26 Ind. 220; *M'Ghee v. Ellis*, 4 Litt. (Ky.) 244. Neither this nor the doctrine of the principal case, it is submitted, is inconsistent with the doctrine of *caveat emptor*. The right of the judgment creditor is against the debtor's property, and the writ is directed solely against such property. *Heberling v. Jaggard*, 47 Minn. 70, 49 N. W. 396; *Burwell v. Herron*, 16 So. 356 (Miss.). The purchaser relies on what is professed, namely, the sale of the debtor's right in the chattel. If the debtor has no right, then there is a total failure of consideration, and so the money paid is not properly applicable to the debt. The contrary view is inequitable toward the debtor because depressing prices at execution sales. The principal case provides for a wholly equitable result, for if recovery by the purchaser is allowed against the judgment creditor, the creditor may thereupon have his judgment against the debtor vacated and a new execution awarded on the ground that the debt has never been paid. *Magwire v. Marks*, 28 Mo. 193; *Bressler v. Martin*, 133 Ill. 278, 24 N. E. 518. But *cf.* *Thomas v. Glazener*, 90 Ala. 537, 8 So. 153. So, it seems, the principal case is correct. See *Sanders v. Hamilton*, 3 Dana (Ky.) 550, 552. *Contra*, *England v. Clark*, 5 Ill. 486; *Lewark v. Carter*, 117 Ind. 206, 20 N. E. 119. If, however, there are intervening circumstances making recovery inequitable, *e. g.* bankruptcy of the debtor, then the purchaser should not be allowed to recover.

HABEAS CORPUS — REVIEW OF HABEAS CORPUS PROCEEDINGS. — From an order in *habeas corpus* proceedings, discharging a prisoner, error was brought. *Held*, that the order is not reviewable. *Wisener v. Burrell*, 28 Okl. 546, 118 Pac. 999. See NOTES, p. 460.

HUSBAND AND WIFE — RIGHTS OF WIFE AGAINST HUSBAND AND IN HIS SEPARATE PROPERTY — RIGHT TO BE REIMBURSED FOR EXPENDITURES FOR NECESSARIES. — The plaintiff, a married woman, having been abandoned by her husband without just cause, and being unable to procure necessities on his credit, purchased them with the proceeds of her labor and of her separate estate. She sought to recover from her husband the amount so expended. *Held*, that the plaintiff can recover. *De Brawwere v. De Brawwere*, 203 N. Y. 460.

The Court of Appeals, in affirming the judgment of the Appellate Division, expressly repudiates the theory of subrogation, and bases the right of action on the breach of the legal duty to support. For a discussion of the principles involved see 24 HARV. L. REV. 306.

INJUNCTIONS — ACTS RESTRAINED — BILL OF REVIEW IN ANOTHER STATE. — The wife of a divorcee sued in New York to enjoin the first wife from prosecuting an action in Illinois to annul the decree of divorce granted by the Illinois court. The Illinois decree had previously been adjudged valid by the New York courts in an action by the first wife against the divorcee. *Held*, that the injunction should not be granted. *Guggenheim v. Wahl*, 203 N. Y. 390, 96 N. E. 726.

It is clearly settled that a court of equity can enjoin parties within its jurisdiction from proceeding in an action in a foreign state when it would be inequitable to compel the complainant to defend in that state. *Gordon v. Munn*, 81 Kan. 537, 106 Pac. 286; *Miller v. Miller*, 66 N. J. Eq. 436, 58 Atl. 188. In general, the proceeding to restrain which an injunction is granted involves questions which are in litigation or could properly be litigated in the jurisdiction in which the injunction is granted. *Von Bernuth v. Von Bernuth*, 76 N. J. Eq. 177, 73 Atl. 1049; *Kempson v. Kempson*, 58 N. J. Eq. 94, 43 Atl. 97. In the principal case, however, the only forum in which the defendant can bring a bill of review is in Illinois. *Mathias v. Mathias*, 202 Ill. 125, 66 N. E. 1042. This seems to the court to be conclusive. It should at least, it is submitted, be of very great weight, on the ground of comity. *Bigelow v. Old Dominion Copper Mining, etc. Co.*, 74 N. J. Eq. 457, 71 Atl. 153. See *Harris v. Pullman*, 84 Ill. 20, 28; *Peck v. Jenness*, 48 U. S. 612, 624-625. As it is not shown that the complainant cannot get full and adequate relief in Illinois, the injunction is properly refused. Nor is the holding inconsistent with the doctrine of *res judicata*, for the complainant was not a party to the previous suit in New York.

INJUNCTIONS — ACTS RESTRAINED — PRIVATE NUISANCE ENJOINED THOUGH INJUNCTION CAUSES EXCESSIVE HARDSHIP. — The defendant, a large cement manufacturing company, was enjoined from continuing operations because a neighboring fruit-grower showed that the dust, unavoidably liberated from its furnaces, was a nuisance to him. On appeal, the defendant prayed a stay of the injunction pending the appeal and showed that the shutting down of its plant, even temporarily, would cause tremendous losses to it. *Held*, that the defendant is not entitled to the stay. *Hulbert v. California Portland Cement Co.*, 118 Pac. 928 (Cal.).

This decision accords with the well-established rule that a court of equity will interfere to prevent "private eminent domain." The court refuses to give any weight to the so-called "balance of hardship" doctrine that is finding favor with a growing minority of the American courts and is rapidly infringing upon the older rule. For a discussion of this doctrine see 22 HARV. L. REV. 596.

LEGACIES AND DEVICES — PAYMENT — INTEREST ON LEGACY PAYABLE OUT OF REVERSIONARY PROPERTY. — A testator bequeathed £10,000 to his sister to be paid out of the estate inherited by him from his mother. This consisted of a reversion following a life interest in his father. The testator died seven years before his father. *Held*, that the sister's legacy bears interest from the expiration of one year after the death of the testator. *Re Walford*, 132 L. T. J. 58 (Eng., C. A., Nov. 1, 1911).

The general rule is that when no particular time is set for the payment of legacies, they are payable with interest from the expiration of one year after the death of the testator. See *Lord v. Lord*, L. R. 2 Ch. 782, 789. The appli-

cation of this rule will not be defeated by the fact that the estate could not be got in within the year, or that the court had ordered the payment to be delayed beyond that time. *Martin v. Martin*, 6 Watts (Pa.) 67; *Bonham v. Bonham*, 38 N. J. Eq. 419. It will apply although the estate consists largely of reversionary interests. *In re Blackford*, 27 Ch. D. 676. An intent on the part of the testator that it should not apply has been inferred where the payment of interest on preferred legacies from that date would prevent the payment of other legacies. *Wheeler v. Ruthven*, 74 N. Y. 428. But this case must be limited to its special facts. *Matter of Rutherford*, 196 N. Y. 311, 89 N. E. 820. Very clear evidence of a contrary intent is necessary to prevent the operation of the general rule. See 2 LL. L. REV. 440. It has been held, however, against the principal case, that where a legacy is payable out of a reversion it carries interest only from the time that the reversion falls in. *Earle v. Bellingham*, 24 Beav. 448; *Gibbon v. Chaytor*, [1907] 1 I. R. 65. See 2 JARMAN, WILLS, 6 ed., 1108.

LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS — ACTION AGAINST WITNESS AND PARTY INDUCING HIM TO TESTIFY FALSELY. — A wife sued her husband for a divorce and upon a claim for money. The husband procured a witness to testify falsely that the wife had committed adultery with her attorney, whereby the divorce suit and money claim were lost. The attorney, who had been assigned a part interest in the money claim, sued the witness and the husband in an action of tort. *Held*, that he has a cause of action against neither. *Schaub v. O'Ferrall*, 81 Atl. 789 (Md.).

The witness is protected from actions of slander by his absolute immunity while testifying. *Seaman v. Netherclift*, 2 C. P. D. 53; *Hunckel v. Voneiff*, 69 Md. 179, 14 Atl. 500. The same policy promoting free testimony bars all actions against him for perjury. *Damport v. Simpson*, Cro. Eliz. 520; *Dunlap v. Glidden*, 31 Me. 435. But his co-defendant has intentionally harmed the plaintiff without excuse and has not the protection of the witness stand. One inducing another to do harm is not relieved by the fact that the other has a defense. *Hoosac Tunnel Dock & Elevator Co. v. O'Brien*, 137 Mass. 424; *Emery v. Hapgood*, 7 Gray (Mass.) 55. See *The Bernina*, 12 P. D. 58, 83. Where the witness slanders a stranger to the suit, the instigator is liable. *Rice v. Coolidge*, 121 Mass. 393. But to limit litigation, a party to the suit cannot sue for subornation of perjury where the false testimony was made in connection with an issue raised therein. *Smith v. Lewis*, 3 Johns. (N. Y.) 157; *Taylor v. Bidwell*, 65 Cal. 489, 4 Pac. 491. An attorney is neither party nor privy. But the attorney here was partial assignee. Where statutes allow the real party in interest to sue, he may join with the assignor. *Fireman's Fund Ins. Co. v. Oregon R. & Navigation Co.*, 45 Or. 53, 76 Pac. 1075; *Earnest v. Barrett*, 6 Ind. App. 371, 33 N. E. 635. But cf. *Otis v. Adams*, 56 N. J. L. 38, 27 Atl. 1092. Without such statute, he is in substance a co-owner of the claim and should be concluded by the judgment against the assignor. His proper remedy is a bill in equity to set it aside. See 1 BLACK, JUDGMENTS, 2 ed., § 317. But see 6 POMEROY, EQUITY JURISPRUDENCE, § 656.

MANDAMUS — PROCEEDINGS — PREMATURE COMMENCEMENT. — The defendant railroads were ordered by a commission to make track connections within ninety days. They manifested a determination to disobey the order. Three days later application was made for a writ of *mandamus*. *Held*, that the action is not premature. *State ex rel. Dawson v. Chicago, B. & Q. R. Co.*, 118 Pac. 872 (Kan.).

The general rule is that *mandamus* will issue only upon actual default in a duty owed by the defendant at the time of the application for the writ. *State ex rel. Board of Education v. Hunter*, 111 Wis. 582, 87 N. W. 485. It is said

that courts will not anticipate the omission of a legal duty. *State ex rel. Piper v. Gracey*, 11 Nev. 223. Many of these cases could be supported either on the ground that, like the remedy of specific performance, *mandamus* is granted only in the sound discretion of the court, or on the ground that no legal duty rested on the defendant. *United States ex rel. Langley v. Bowen*, 6 D. C. 196; *Northwestern Warehouse Co. v. Oregon Ry. & Navigation Co.*, 32 Wash. 218, 73 Pac. 388. The prevailing view seems inconsistent with the very nature of *mandamus*, which is to prevent a failure of justice. *Attorney General v. City of Boston*, 123 Mass. 460. As the court points out, often the benefits of the act will be lessened or lost, and irremediable damage done, unless it is performed within the stated time. *State ex rel. Howells v. Metcalf*, 18 S. D. 393, 100 N. W. 923. An opposite result would secure to the public punctual performance, and if the writ were not made peremptory, the defendant could not be unduly prejudiced by being forced to show justification for a refusal to perform. See *Chicago, etc. R. Co. v. Commissioners of Chase County*, 49 Kan. 399, 414, 30 Pac. 456, 459. The decision, although overruling previous Kansas cases, and contrary to the great weight of authority, shows a commendable tendency towards preventive justice.

MECHANICS' LIENS — EFFECT OF REPLACING DEFECTIVE MATERIALS ON TIME FOR FILING STATEMENT. — A statute made the lien of a subcontractor for materials furnished conditional on the filing of a statement within sixty days after furnishing the materials. A subcontractor replaced certain defective materials at the instance of the owner of the building and filed a statement within sixty days afterwards. The other materials furnished by the subcontractor were all delivered more than sixty days before the filing of the statement. *Held*, that the subcontractor has no lien for the materials furnished. *Cady Lumber Co. v. Reed*, 133 N. W. 424 (Neb.).

Under such statutes the period for filing the statement begins to run after the last item has been furnished under the contract. *Patton v. Matter*, 21 Ind. App. 277, 52 N. E. 173; *Hensel v. Johnson*, 94 Md. 729, 51 Atl. 575. The authorities on the question decided in the principal case are in conflict. The cases supporting the principal case are based on the ground that the materials are not furnished under the contract, but are given as a reparation for an injury inflicted. *Harrison v. Homeopathic Association*, 134 Pa. St. 558, 19 Atl. 804; *Voightman v. Southern Ry. Co.*, 123 Tenn. 452, 131 S. W. 982. The cases opposed argue that the materials are furnished under the contract, that in furnishing them the subcontractor fulfils a hitherto imperfectly performed obligation. *St. Louis National Stock Yards v. O'Reilly*, 85 Ill. 546; *Conlee v. Clark*, 14 Ind. App. 205, 42 N. E. 762. The analysis of the latter cases would seem correct. It might be urged in objection to this view that it would subject the owner to the danger of a double payment where he had paid the original contractor sixty days after the delivery but before the discovery of the defects. But in such a case, it is submitted, the subcontractor would be estopped for this purpose to set up that the subsequently furnished materials were furnished under the contract.

MECHANICS' LIENS — MATERIALS FURNISHED BUT NOT USED. — The plaintiffs supplied iron and steel work for the construction of the defendants' building. Owing to a change in the plans over which the plaintiffs had no control, a part of the materials furnished by them was never used. A statute provided that "whoever . . . furnishes labor or materials in erecting . . . a house, building, or appurtenances . . . has a lien thereon." *Held*, that the plaintiffs are not entitled to a lien for the unused materials. *Fletcher-Crowell Co. v. Chevalier*, 81 Atl. 578 (Me.).

Jurisdictions are squarely in conflict on whether materials furnished but

not actually used can be the basis of a mechanic's lien under the statutes. See *BOISOT, MECHANICS' LIENS*, § 119; note to *Central Lumber Co. v. Brad-dock Land and Granite Co.*, 13 Ann. Cas. 11. The justice of mechanics' lien laws consists in charging the realty whose value has been enhanced by the addition of labor or materials as security for the price thereof. See *Taggard v. Buckmore*, 42 Me. 77, 81; *BOISOT, MECHANICS' LIENS*, § 7. Therefore, even a liberal construction of the statute should not include materials which are never used. Actual use should be required, though not necessarily physical incorporation into the structure. See 25 HARV. L. REV. 92.

MORTGAGES — PRIORITIES — EFFECT OF LIS PENDENS ON MORTGAGE FOR FUTURE ADVANCES. — The plaintiff gave A. notes to collect and invest the proceeds in land in the plaintiff's name. A. took title in his own name and executed a mortgage to secure future advances to the defendants, who had no knowledge of the plaintiff's right. The plaintiff sued A. for an accounting and asserted a lien on the land, and during the suit money was advanced by the defendants, still without knowledge either of the plaintiff's right or of the suit. *Held*, that the defendants' mortgage for all the sums advanced is entitled to priority over the plaintiff's lien. *Straeffer v. Rodman*, 141 S. W. 742 (Ky.).

Where a person has acquired a right in specific property, the doctrine of *lis pendens* will not invalidate any act he may do after bringing of suit in pursuance of such right or for the purpose of carrying it into effect. Thus, where an agreement to sell is made before suit, a conveyance afterward is not invalidated. *Parks v. Smool's Admrs.*, 105 Ky. 63, 48 S. W. 146. So also a mortgagee may buy at his own sale pending a suit to establish a mechanic's lien. *Andrews v. National Foundry & Pipe Works*, 77 Fed. 774. By the weight of authority a mortgage for future advances vests a right in the mortgagee for all advances which may be made, if they are optional, unless there is actual notice of intervening encumbrances. *Ward v. Cooke*, 17 N. J. Eq. 93. And, if the advances are obligatory, actual notice will not invalidate them. *Crane v. Deming*, 7 Conn. 387. The principal case is therefore sound. As the doctrine of *lis pendens* does not apply, the mortgagees are *bonâ fide* purchasers without notice of the plaintiff's right.

MUNICIPAL CORPORATIONS — LIABILITY FOR TORTS — DAMAGE CAUSED BY BURSTING OF SEWER OF INADEQUATE SIZE. — A city constructed a sewer, the capacity of which was insufficient to provide for the sewage and surface water reasonably to be expected. A rainstorm caused the sewer to burst, whereby goods in the cellar of the plaintiff's warehouse were damaged. *Held*, that if the rainstorm was extraordinary, the city is not liable. *Geuder, Paeschke & Frey Co. v. City of Milwaukee*, 133 N. W. 835 (Wis.).

A city is not answerable for damage caused by insufficiency of the plan of sewerage to drain the plaintiff's premises. *Mills v. City of Brooklyn*, 32 N. Y. 489; *Robinson v. City of Everett*, 191 Mass. 587, 77 N. E. 1151. It follows that the language of the principal case is too broad in intimating that a city must use due care to provide means to carry away surface water ordinarily to be expected. A city is liable, however, when the execution of the plan of sewerage results in a "taking" of private property. Collecting water in an artificial channel with an inadequate outlet, which, it can be foreseen, will flood the plaintiff's lands, is a "taking" of his property. *Ashley v. Port Huron*, 35 Mich. 296; *Seifert v. City of Brooklyn*, 101 N. Y. 136, 4 N. E. 321. See 1 LEWIS, EMINENT DOMAIN, 3 ed., § 65. The outlet must be large enough to provide for all water reasonably to be expected, and hence the city should be liable whether the storm is ordinary or extraordinary, if it is not unprecedented. *Cf. Philadelphia, etc. R. Co. v. Davis*, 68 Md. 281, 11 Atl. 822; *Gulf*,

etc. Ry. Co. v. Pomeroy, 67 Tex. 498, 3 S. W. 722. The decision of the principal case is supported by much authority, but the better view would seem to be that indicated above.

PARENT AND CHILD — PERSONS ENTITLED TO CUSTODY OF CHILD. — The paternal grandparents in comfortable circumstances sought to obtain custody of a child from the mother, who had been deserted by her husband and was earning a scant livelihood. *Held*, that they may have it. *Brown v. Brown*, 56 So. 589 (Ala., App. Ct.).

A white widow with two white children married a mulatto. A Children's Home Society asked for custody of the children. *Held*, that it may not have it. *Moon v. Children's Home Society of Virginia*, 72 S. E. 707 (Va.).

In a conflict between the parents as to the right of custody of the child, the early English rule that the father was entitled to it has gradually given way in this country to the sounder principle that the welfare of the child is the most important consideration. *King v. Greenhill*, 4 A. & E. 624; *Turner v. Turner*, 93 Miss. 167, 46 So. 413. See SCHOULER, DOMESTIC RELATIONS, 5 ed., § 248. However, when the dispute is between a parent and an outsider, that should not be the sole test, for just claims of the parent must also be considered; the child has duties as well as rights. Accordingly, by the weight of authority, if the parent is able to give the child proper care and is not positively unsuitable for the trust, he will be given custody of the child, even though another can offer it greater material advantages. *Moore v. Christian*, 56 Miss. 408; *Stapleton v. Poynter*, 111 Ky. 264, 62 S. W. 730. *Contra*, *Wood v. Wood*, 77 N. J. Eq. 593, 77 Atl. 91. The Alabama decision seems, therefore, to neglect the parent's claim, although the entire question is one of discretion, depending on all the facts of the case. The other decision presents a novel form of disadvantage to the child, namely, loss of social position, but, on the principles stated, appears correct. It incidentally holds that remarriage does not deprive a mother of her right to the child. This seems sound, notwithstanding some technical arguments to the contrary. *Beall v. Bibb*, 19 App. D. C. 311. *Contra*, *Worcester v. Marchant*, 14 Pick. (Mass.) 510.

PUBLIC SERVICE COMPANIES — RIGHTS AND DUTIES — DISCRIMINATION BY ELEVATOR ALLOWANCES TO SHIPPERS. — The Interstate Commerce Act permits allowances to shippers for services rendered in transportation. Certain railways, on their through rates, made an allowance to elevator owners at Missouri River points for the transfer in transit of their own as well as other grain. The Interstate Commerce Commission found that the process of elevation was being utilized for cleaning, clipping, mixing, and grading the grain belonging to the elevator owners, as dealers, and forbade further allowances upon such grain unless the treatment during elevation was discontinued. *Held*, that this order exceeds the powers of the commission. *Interstate Commerce Commission v. Dissenbaugh*, 32 Sup. Ct. 22. See NOTES, p. 456.

RECEIVERS — PRIORITY OF RECEIVERS' CERTIFICATES. — The receiver of a steamship company issued certificates and with the proceeds of their sale paid the coupons of the bonds secured by a first mortgage. The funds left in his hands at the final accounting were not sufficient to pay in full both the certificate-holders and the bondholders. *Held*, that the certificate-holders have a prior claim upon the fund. *American Trust Co. v. Metropolitan Steamship Co.*, 190 Fed. 113 (C. C. A., First Circ.). See NOTES, p. 458.

REFORMATION OF INSTRUMENTS — MORTGAGE AFTER FORECLOSURE. — By a mutual mistake, a mortgage described the wrong land. The mortgagee foreclosed and bought in the land, acting under the original mistake. *Held*,

that he is not entitled to reformation of the master's deed. *Fisher v. Villamil*, 56 So. 559 (Fla.).

A mutual mistake in drawing a mortgage, whereby the wrong land is designated, gives the mortgagee an equity to have the mortgage reformed. If the purchaser at the foreclosure sale acts under the same mistake, his misapprehension and the error of the mortgagor and the mortgagee in the mortgage authorizing the sale may be said to constitute a mutual mistake. The mortgagee's equity of reformation is therefore kept alive and passes to the purchaser, and thus the purchaser gets an equity of reformation against the mortgagor. He should be able to enforce this equity by getting reformation of the mortgage and the sheriff's deed, — or, if the court dislikes to reform a judicial proceeding, by getting a conveyance, having the effect of reformation, — provided that this is fair to the mortgagor. *Quivey v. Baker*, 37 Cal. 465; *Waldron v. Letson*, 15 N. J. Eq. 126. *Contra*, *Miller v. Kolb*, 47 Ind. 220. But if owing to the mistake the land was not sold for all that the right land might have brought, the buyer should be allowed to get reformation of the mortgage and rescission of the sheriff's sale, and a new foreclosure should be had. *Conyers v. Mericles*, 75 Ind. 443; *Blodgett v. Hobart*, 18 Vt. 414. *Contra*, *Stephenson v. Harris*, 131 Ala. 470, 31 So. 445.

RESCISSION — RESCISSION UPON OTHER PARTY'S BREACH, REPUDIATION, OR INABILITY TO PERFORM — FORFEITURE OF DEPOSIT. — The defendant agreed in writing to purchase land of the plaintiff for £2450, of which £50 was to be paid as a deposit to the plaintiff's solicitors, as stakeholders. The contract made no provision as to the disposition of the deposit in the event of the purchaser's default. The deposit was paid, but the defendant neglected to pay the balance of the price, and an order was made rescinding the contract. *Held*, that the deposit is forfeited to the plaintiff. *Hall v. Burnell*, [1911] 2 Ch. 551.

When a contract of sale stipulates that part of the purchase price is to be paid down as a deposit and forfeited to the vendor in case of failure to pay the balance, the latter can recover the deposit on the purchaser's default. *Collins v. Stimson*, 11 Q. B. D. 142; *Thompson v. Kelly*, 101 Mass. 291. When no provision is made for the disposition of the deposit, the intent of the parties is to be judged from the whole contract, and if any term is inconsistent with the vendor's retention of the deposit, it must be returned. *Palmer v. Temple*, 9 A. & E. 508. It is submitted that the relative size of the deposit and purchase price should be regarded as evidence as to whether a forfeiture was contemplated in case of failure to pay the balance. If no evidence as to the disposition of deposit can be gathered, the vendor may retain it, even though he has rescinded the contract or asks simultaneously for its rescission. *Howe v. Smith*, 27 Ch. D. 89; *Dunn v. Vere*, 19 Wkly. Rep. 151. *Contra*, *Jackson v. De Kadish*, [1904] Wkly. Notes 168. The principal case, following these decisions, shows a tendency to depart from the strict English rule that there can be no rescission unless all benefits acquired under the contract are returned. *Cf. Hunt v. Silk*, 5 East 449; *Blackburn v. Smith*, 2 Exch. 783.

RESTRAINT OF TRADE — COMBINATION BY AGREEMENTS AS TO PRODUCT OR PRICES — PATENTED ARTICLES. — The patentee of a dredger, useful but not indispensable in making enameled bathtubs, licensed four-fifths of the manufacturers of such ware to use it in return for their agreements to resell the unpatented bathtubs at certain prices, and only to designated jobbers, who in turn agreed to maintain non-competitive prices. *Held*, that the contracts constitute an illegal combination under the Sherman Anti-Trust Act. *United States v. Standard Sanitary Mfg. Co.*, 191 Fed. 172 (Circ. Ct., D. Md.) See NOTES, p. 454.

SALES — CONDITIONAL SALES — EFFECT ON SELLER'S TITLE OF TRANSFER OF NOTE GIVEN FOR PRICE. — Under a contract of conditional sale, the plaintiff delivered an automobile, and took a promissory note for the unpaid balance of the price. He assigned the note to a bank, as collateral security for a loan. *Held*, that the assignment of the note vested an absolute title in the buyer. *Winton Motor Carriage Co. v. Broadway Automobile Co.*, 118 Pac. 817 (Wash.). See NOTES, p. 462.

SPECIFIC PERFORMANCE — LEGAL CONSEQUENCES OF RIGHT OF SPECIFIC PERFORMANCE — EFFECT OF OPTION TO PURCHASE. — A. leased land to B., giving him an option to purchase at any time within five years on notifying A. or "his legal representative." A. died intestate, and B. notified A.'s administratrix of his intention to exercise his option. *Held*, that this notice is sufficient. *Rockland-Rockport Lime Co. v. Leary*, 203 N. Y. 469.

This case, although affirming the decision of the Appellate Division on the ground that the phrase "legal representative" in the option meant the administratrix, expresses a strong opinion that the lower court was in error in regarding the option as working an equitable conversion *ab initio*. See 23 HARV. L. REV. 70.

STATUTE OF FRAUDS — PART PERFORMANCE — RETENTION OF POSSESSION. — The plaintiff, while in possession of land of the defendant's testator as tenant at will, made an oral contract with him for the purchase of the land and continued in possession. *Held*, that the retention of possession renders evidence of the parol contract admissible, and if possession was retained under the contract, the plaintiff is entitled to specific performance. *O'Donnell v. O'Donnell*, 11 N. S. W. 340 (C. J. in Eq.).

The general rule unquestionably is that equity will take an oral agreement for the sale of land out of the Statute of Frauds on the ground of part performance only when the acts of part performance are referable exclusively to the existence of an agreement for the transfer of an interest in that land. *Frame v. Dawson*, 14 Ves. Jr. 386; *Phillips v. Thompson*, 1 Johns. Ch. (N. Y.) 131. The reason assigned for this requirement is that acts which might have been done with another view cannot properly be said to be done by way of part performance of the alleged agreement. See 2 STORY, EQUITY JURISPRUDENCE, 13 ed., § 762. In applying the rule, the distinction almost universally made between the act of taking and that of merely continuing to hold possession seems sound on principle, the latter act, if unaccompanied by other circumstances, being clearly equivocal. *Emmel v. Hayes*, 102 Mo. 186, 14 S. W. 209. See *Wills v. Stradling*, 3 Ves. Jr. 378, 381; *Morphett v. Jones*, 1 Swanst. 172, 181. The decision in the present case, therefore, would seem to be difficult of justification, since, while sanctioning and professing to follow cases which adopt the general rule, it not only repudiates the above distinction, but lays down a principle inconsistent with the reason on which the general rule is based.

STATUTES — IMPEACHMENT OF STATUTES — READING AND RECONSIDERATION. — A state constitution required that every bill be read on three different days in each house. The Senate rules provided that a motion to reconsider any bill could be made within two days after its passage. Bills identical in title and matter were introduced in both houses simultaneously. The House bill after passage was substituted for the Senate bill at its third reading. The Senate passed it, reported its passage to the House, and sent it to a joint committee for transmission to the Governor. Within two days the Senate moved to reconsider the bill, but failed to regain possession of it from either the House, the Governor, or the Secretary of State. *Held*, that the bill is now law. *Smith v. Mitchell*, 72 S. E. 755 (W. Va.).

One judge dissents upon the ground that the bill had only been read once in the Senate. But an amendment or a change in the number of a bill does not require three new readings. *Capito v. Topping*, 65 W. Va. 587, 64 S. E. 845; *Allopathic State Board of Medical Examiners v. Fowler*, 50 La. Ann. 1358, 24 So. 809. It seems somewhat technical to say that this bill did not have the required number. *Archibald v. Clark*, 112 Tenn. 532, 82 S. W. 310. A second and stronger ground for the dissent is that the Senate should have been allowed to reconsider its vote according to its rule. The majority feel that the Senate had lost control of the bill. A governor, within stated limits, can withdraw his approval from a bill so long as he keeps possession of the paper. *People v. Hatch*, 19 Ill. 283; *People v. McCullough*, 210 Ill. 488, 71 N. E. 602. Some authorities apparently rest the power of a legislative body upon the same criterion. *Wolfe v. McCaull*, 76 Va. 876. See JEFFERSON, MANUAL, § 43. Others carry a clear implication that, within the time allowed for reconsideration, possession of the bill may be regained if properly applied for. See *People v. Devlin*, 33 N. Y. 269, 287; CUSHING, LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES, 2 ed., §§ 1274, 2394 *et seq.* To allow the Senate to get the bill back from the Governor would apparently curtail the time allotted him for consideration of the bill. W. VA. CONST., Art. 7, § 14.

TRADE-MARKS AND TRADE-NAMES — PROTECTION APART FROM STATUTE — PARTICIPATION IN ILLEGAL ENTERPRISE AS BAR TO RELIEF AGAINST UNFAIR COMPETITION. — The defendant sold medicinal preparations under a description calculated to produce the impression that they were products of the plaintiff. The plaintiff was violating the law forbidding stock corporations to practise medicine or conduct hospitals. *Held*, that the plaintiff is entitled to an injunction. *World's Dispensary Medical Association v. Pierce*, 96 N. E. 738 (N. Y.).

An injunction will issue against selling goods in a manner likely to deceive the public as to the proprietorship of the goods, although the plaintiff's description may not be the subject of trade-mark. *Croft v. Day*, 7 Beav. 84; *Sterling Remedy Co. v. Spermine Medical Co.*, 112 Fed. 1000. The basis of the relief is not the fraud upon the public but the unfair competition with the plaintiff through the deception of the public. See 4 HARV. L. REV. 321. Relief is refused if the plaintiff is guilty of misconduct relating to the subject matter of the controversy. Thus misrepresentation as to the composition, the manufacturer, or place of manufacture, of the goods, or the existence of a patent upon them, is a bar. *Worden v. California Fig Syrup Co.*, 187 U. S. 516, 23 Sup. Ct. 161; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 2 Sup. Ct. 436; *Preservaline Mfg. Co. v. Heller Chemical Co.*, 118 Fed. 103. But misconduct in collateral matters is no bar. *Mossler v. Jacobs*, 66 Ill. App. 571. For in applying the doctrine of clean hands the court cannot go outside of the precise matter in litigation. See 1 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 399. The sale of other articles with fraudulent representations is collateral. *Shaver v. Heller & Merz Co.*, 108 Fed. 821. So is participation in a combination in restraint of trade. *Cf. General Electric Co. v. Re-New Lamp Co.*, 128 Fed. 154; *Cœur d'Alene Consolidated and Mining Co. v. Miners' Union*, 51 Fed. 260. In the principal case, the illegality had no immediate or necessary relation to the sale of the goods.

TRADE UNIONS — IN GENERAL — LEGALITY AT COMMON LAW. — The defendant, who was believed to be totally incapacitated by accident from following his employment, received from his union a sum of money which he agreed to refund in case of recovery. The defendant recovered and refused to return the money. The union officials brought suit upon the agreement.

Held, that trade unions are unlawful at common law, so this action is not maintainable. *Baker v. Ingall*, 132 L. T. J. 131 (Eng., C. A., Nov. 30, 1911). See NOTES, p. 465.

TRUSTS — NATURE OF TRUST RELATION — CESTUI QUE TRUST AS TRUSTEE. — A testator devised property to A. in trust to pay the income to B. for life, and to pay B. any part of the principal which, in his judgment, B. might require for his support; remainder to A. *Held*, that another trustee should be appointed to manage the trust estate during the life of B. *Matter of Townsend*, 73 N. Y. Misc. 481 (Surr. Ct., Cattaraugus Co.).

The general rule that no one whose duty and interest may conflict should be appointed as trustee is everywhere recognized. *In re Harrop's Trusts*, 24 Ch. D. 717. *Cf. In re Tempest*, L. R. 1 Ch. 485. See 1 PERRY, TRUSTS AND TRUSTEES, 6 ed., § 59. The rule, being one of discretion, must occasionally yield to special circumstances. *Ex parte Conybeare's Settlement*, 1 Wkly. Rep. 458. In their application, however, the English courts follow the rule far more carefully than the American. Thus, an English court will not ordinarily appoint a relative or solicitor of a *cestui que trust*. *Wilding v. Bolder*, 21 Beav. 222; *In re Kemp's Settled Estates*, 24 Ch. D. 485. And a *cestui que trust* is in England never allowed to serve as sole trustee. *Re Lightbody's Trusts*, 52 L. T. J. 40. On principle and authority there is a difference between the appointment and removal of a trustee. *Curran v. Green*, 18 R. I. 329, 27 Atl. 596. A settlor or donee of a power to appoint a trustee may appoint as trustee a person whom the court would not itself appoint. *In re Earl of Stamford*, [1896] 1 Ch. 288, 299. But, it is submitted, in cases where the trustee's duty and interest will inevitably conflict, the court is justified in refusing to confirm a settlor's appointment. The English courts, in similar cases, have reached a result like that in the principal case. *In re Norris*, 27 Ch. D. 333.

TRUSTS — RIGHTS AND LIABILITIES OF THIRD PARTIES — PERSONAL LIABILITY OF TRUSTEES. — Trustees mortgaged the trust property and covenanted to pay the mortgage debt "as such trustees, but not otherwise." *Held*, that the trustees are liable personally for the mortgage debt. *In re Robinson's Settlement*, 46 L. J. 785 (Eng., Ch. D., Dec. 5, 1911).

A trustee is liable in full on contracts made for the trust estate, although he describes himself as "trustee." *Duval v. Craig*, 2 Wheat. (U. S.) 45; *Muir v. City of Glasgow Bank*, 4 App. Cas. 337. Since the estate cannot be liable at law, a judgment may always be had against him personally. *Taylor v. Davis' Admx.*, 110 U. S. 330, 4 Sup. Ct. 147. But he may everywhere limit his liability, expressly, to the amount of the trust fund in his hands. *Williams v. Hathaway*, 6 Ch. D. 544; *Shoe and Leather National Bank v. Dix*, 123 Mass. 148. It has been held in England that a clause exempting the trustee from "personal liability" attempts to destroy all liability and is void as being repugnant to the covenant itself. *Furnivall v. Coombes*, 5 M. & G. 736; *Walling v. Lewis*, [1911] 1 Ch. 414. Yet the plain intention of such a clause is only to exempt the trustee's own property. A different result would certainly be reached in the United States, where the constant practice is to regard the intention of the parties, retaining the presumption in favor of full liability. *Glenn v. Allison*, 58 Md. 527; *Germania Bank v. Michaud*, 62 Minn. 459, 65 N. W. 70. The principal case proceeds on the ground that to limit liability would here destroy it altogether. *Cf. Fehlinger v. Wood*, 134 Pa. St. 517, 19 Atl. 746. But, in the absence of misrepresentation, the plaintiff has consciously assumed the risk of such a result. *Day v. Brown*, 2 Oh. 345; *Thayer v. Wendell*, 1 Gall. (U. S.) 37. See *Hussey v. Arnold*, 185 Mass. 202, 204, 70 N. E. 87, 88. The words used can scarcely be considered ambiguous. *Cf. Gordon v. Campbell*, 1 Bell App. Cas. 428.

USURY — NATURE AND VALIDITY OF USURIOUS CONTRACTS — GUARANTEE TO LENDER OF RISE IN VALUE OF STOCKS SOLD TO MAKE LOAN. — In return for a loan by the plaintiff the defendant agreed to repay the amount advanced with interest, the cost to the plaintiff of selling stock to procure the money loaned, and the rise in value of and dividends on the stock during the period of the loan. *Held*, that this does not constitute usury. *De Molke-Huitfeldt v. Garner*, 145 N. Y. App. Div. 766, 130 N. Y. Supp. 558.

A lender may be compensated for his services or expenses in raising the money for the loan in addition to interest. *Thurston v. Cornell*, 38 N. Y. 281; *Kihlholz v. Wolf*, 103 Ill. 362. A contract guaranteeing to the lender the rise in value of stock sold to make the loan, without hazarding the sum advanced and interest, has been held usurious. *White v. Wright*, 3 B. & C. 273. A contrary result reached by the Massachusetts court was based on the ground that the contract contemplated two acts, the loan and the preliminary act of selling the stock, and that this preliminary act was consideration for the payment of the rise in value of the stock. *Snow v. Nye*, 106 Mass. 413. But in practically all cases the lender either disposes of property or foregoes an investment to make the loan. By a fair construction of the usury statute such a detriment is incident to and included in the transaction termed a loan. So it has been held that a lender cannot charge for the sacrifice he has made in selling securities to make the loan. *Van Tassell v. Wood*, 12 Hun (N. Y.) 388. The result reached by the principal case would seem to violate the spirit and lessen the effectiveness of the statute.

BOOK REVIEWS.

A TREATISE ON THE MODERN LAW OF EVIDENCE. By Charles Frederick Chamberlayne. Volumes 1 and 2. Albany: Matthew Bender & Company; London: Sweet & Maxwell. 1911. pp. cxxii, xxviii, 2328.

These two volumes are the first instalment of a larger work. The first volume, entitled "Administration," contains introductory matter, and deals with Law and Fact, the function of the Court and Jury, general principles governing Judicial Administration, and Judicial Notice. The latter subject is divided into "Judicial Knowledge" and "Common Knowledge," and a chapter on "Special Knowledge" follows. The second volume, which is entitled "Procedure," includes the Burden of Proof, Presumptions, Admissions, Confessions, and Former Evidence. The terms "Procedure" and "Administration" are used to mark the distinction between "judicial action controlled by rule and action not so controlled," and this distinction is much insisted on throughout the book. Mr. Salmond's criticism of the law of evidence — a criticism with a special point for this country beyond what its author can well have realized — is quoted with approval:

"No unprejudiced observer can be blind to the excessive credit and importance attached in judicial procedure to the *minutiae* of the law of evidence. This is one of the last refuges of legal formalism. Nowhere is the contrast more striking between the law's confidence in itself and its distrust of the judicial intelligence. The fault is to be remedied not by the abolition of all rules for the measurement of evidential value, but by their reduction from the position of rigid and peremptory to that of flexible and conditional rules. Most of them have their source in good sense and practical experience, and they are profitable for the guidance of individual discretion, though mischievous as substitutes for it."

And the advantage of flexible and rational methods as against the "rigidity of procedural law" is constantly urged. There are many acute and vigorous

comments on the extremes to which our system has gone in tying the hands of the trial judge and treating the law of evidence as a body of minute rules to bind him instead of general principles to guide his judgment, and the attacks on the anachronisms and absurdities of our criminal procedure are particularly refreshing. Altogether Mr. Chamberlayne has made a timely and valuable contribution to the cause of procedural reform.

The wide reading and long reflection which are shown in Mr. Chamberlayne's outlook on his subject as a whole, and in his understanding of its growth and tendencies, appear also in his treatment of Presumptions. He deals with this subject fully in four chapters entitled: "Inferences of Fact," "Presumptions of Law," "Pseudo-Presumptions," and "Administrative Assumptions," and his careful discriminations will help to clear up a tangled and difficult head of the law.

When we turn from the general design of the work to its execution some criticisms suggest themselves. Its bulk is especially to be regretted in a book with so practical a purpose. In his preface Mr. Chamberlayne says:

"Another concession to this necessity for extreme economy in the use of time has been a reluctant indulgence in repetition and the employment of a high degree of condensation."

Whatever may be the compatibility of these two aims in the nature of things, certain it is that in the present instance the former has not been sacrificed to the latter. Mr. Chamberlayne himself confesses to "an amount of repetition which would scarcely be justified in any work which might fairly be expected to be more continuously read or examined at greater leisure." And it leads to other difficulties than mere bulk. The reader, for example, turns with some perplexity from this passage in section 1294 (in support of which *Tilley v. Damon*, 11 Cush. 247, might have been cited):

"A distinction should, upon principle, be drawn between the admission obtained by the use of *duress*, where the will is overpowered or controlled and cases in which the judgment has been misled, by falsifying motives while the will has been left free. The first class of statements are, strictly speaking, involuntary, not the act of the speaker, and should be peremptorily rejected as irrelevant,"

to this in section 1560:

"No rule of exclusion exists or has been suggested as valuable in civil causes. In such cases the admission obtained by duress is admitted in the first instance. The statement is submitted to the jury although the effect of such duress as was inflicted was increased by the fact that the declarant was under arrest or in prison at the time."

It turns out too from the table of contents that topics as important as Writings and Witnesses will not be included in the four large volumes which we had supposed from the announcements would treat the law of evidence comprehensively. Footnotes indicate that these subjects are to be dealt with hereafter; and if the method of their treatment is no less discursive than that now employed we may look forward to something more than a fifth volume. "Common Knowledge" and "Special Knowledge," for instance, are classified according to various forms of human activity—facts of "human experience," "social life," "history," "business" and the like, with further subdivisions such as "carpentering," "chemistry," and "engineering matters"; and we find not less than twenty-two pages allotted to such common knowledge as concerns itself with intoxicating liquors.

Mr. Chamberlayne's terminology also contains matter for serious reflection. In his introduction he says:

"The most obvious suggestion in entering upon the task of definition would be that of coining a novel nomenclature to which a definite scientific meaning could be once for all attached. So inviting a short-cut to precision must reluctantly be disregarded. As Pollock and Maitland (2 Hist. Eng. Law, p. 30) say: 'The license that the man of

science can allow himself of coining new words, is one which by the nature of the case is denied to lawyers."

No doubt the coiner of new words exposes himself to the reproach of strangeness and pedantry, but at least he purchases accuracy and consistency at the price. The evils of his method at their worst can hardly match those which must follow from deliberately adopting so discredited and discreditable a phrase as *res gestæ* for an important part of his analysis. Mr. Chamberlayne has done this with his eyes open. He concedes that the term, while presenting an "appearance of learned exactness," is "notoriously" and "seductively" ambiguous (p. cxxi, § 47), "extremely versatile and elusive" (§ 48), and "of protean meaning" (p. lxxxv), and he even seems to admit that it is "entirely superfluous and principally used at the present time on account of its convenient obscurity" (§ 1026). Its adoption is the less to be excused in one who recognizes (p. cxvi) the importance to clearness of thought of a good terminology. Some of the resulting evils are already to be seen in the unfruitful discriminations between "component," "constituent," and "*res gestæ*" facts, and in the suggestion that for some reason "*res gestæ* facts" are not the subject of judicial knowledge (§§ 700, 714 n. 3, 867). For the hearsay exception which has been afflicted with this name we must await with some apprehension a later volume.

A like criticism, though in a lesser degree, may be made of the terms "administration" and "procedure," the meanings of which are confessedly fixed in a "somewhat arbitrary manner" (p. cxvi). In favor of "administration" it may be said that the more familiar "discretion" is burdened with associations which impair its usefulness for Mr. Chamberlayne's excellent propaganda. But we nevertheless find ourselves involved in uncomfortable double meanings of "procedure" which might have given the author more concern but for his disposition (§§ 167-171) to undervalue the distinction between rights and remedies. And the assumption that "procedure" imports rigidity is not happy in so enlightened an advocate of procedural flexibility.

A habit of statement so cautious that the margin of safety is sometimes excessive ("It has been said to be error for the presiding justice to leave such a preliminary question [of fact] to the jury," § 83. "Probative writings may well be construed by the judge as matter of law. Thus a judge will be justified in not leaving the construction of a letter to the jury," § 130) has not saved Mr. Chamberlayne from the inaccuracies which so large a work naturally involves. In section 75, for example, Massachusetts is cited among states which have authorized juries, by judicial decision, "to invent or improvise a rule of law for themselves in criminal cases." In section 154 it is said that in Massachusetts the determination of foreign law as a question of fact "has been added to the province of the court . . . by judicial decision" — a statement not only unwarranted by the cases cited to support it, but conspicuously inconsistent with *Electric Welding Co. v. Prince*, 200 Mass. 386. In section 382, *York v. Pease*, 2 Gray 282, is cited in support of the rather surprising proposition that

"where rebuttal has been anticipated, as on the examination of the actor's witness, the subject may still be resumed, as a matter of right, upon rebuttal."

And in section 203, note 13, the case of *United States v. Coolidge*, decided in 1815, has led the author to say that "in Massachusetts a witness is not allowed to affirm merely because he prefers to do so. The privilege is strictly limited to Quakers," — a proposition which must be taken as of a period antedating Mass. Stat. 1824, c. 91.

Mr. Chamberlayne's matter is conveniently and attractively arranged for practical use, and an admirable index to the two volumes calls for special praise. The lack of a table of contents will of course be met in a later volume.

E. R. T.

THE LAW OF THE AIR. Three Lectures delivered in the University of London.
By Harold D. Hazeltine. London: University of London Press. 1911. pp.
vii, 152.

This work is unique among law books. A legal writer generally undertakes to state what has already been settled as law. The principal purpose of the present publication is to state legal questions which are likely to arise in future. "The recent rapid development" "of aerial navigation" presents problems of great importance, both in international law and private law. And, as to the solution of these problems, there is no universal agreement on the part of statesmen, and very little in the way of decision on the part of judges.

It will surprise many persons to learn how much some of the new problems have already been discussed by individual jurists, and been made the subject of debate by learned bodies. An international committee is attempting to frame a draft "code of the air"; "and it has already begun the publication of a monthly review devoted to the legal problems of aerial locomotion." A draft bill respecting aerial navigation has been drawn by members of the American Bar Association. The leading theories thus far advanced are clearly summarized by Mr. Hazeltine in a very readable form.

One of the principal points in dispute is whether the prevailing doctrine as to the freedom of the ocean should be applied to the air space above the earth. Should the state be held to have ownership of, or sovereignty over, the entire air space above the earth; or no sovereignty whatever over any part of it; or a sovereignty limited to a zone of a certain height upon "the analogy of the three-mile maritime belt"? (See p. 25.) This "fundamental problem" is discussed in the First Lecture.

Mr. Hazeltine points out the lack of perfect analogy between the ocean and the air space (pp. 14, 15, 24, 25, 41-43). He thinks that the state does not have "ownership" of the air space (p. 40). But he thinks that the state has sovereignty over the entire air space (pp. 44-46, 51). And he believes that the use of this air space by aliens is a matter which can best be regulated by international agreements (pp. 31, 37, 143, 144).

Mr. Hazeltine's Third Lecture is largely occupied with a statement of the proposed rules of international law, in regard to the use of both wireless telegraphy and air vehicles in time of war, — what rules have been proposed and by what countries adopted, what restrictions should be imposed upon belligerents and what upon neutrals. Mention is also made of proposed governmental regulations of the use of airships in time of peace; some regulations having special reference to the safety of passengers, and other regulations with a view to the safety of inhabitants of the district over which flight is attempted (pp. 128-135). The author foresees that "the marking out of the great aerial routes across the territories of states will become a necessity"; and also that "rules of the road will have to be established" (p. 134).

Practising lawyers will be especially interested in Mr. Hazeltine's Second Lecture, which deals with matters of "private law"; such as the correlative rights of landowners and aeronauts, and the liability of the latter for actual damage occurring without fault on their part. These questions are, in a great degree, still unsettled. Until quite lately, one could find in the reports only "a few scattered observations thrown out almost at random, incidentally uttered by judges dealing with cases which were in essence quite different."¹

The landowner cannot safely rely on the old maxim, *Cujus est solum, ejus est usque ad celum*, as furnishing a satisfactory *ratio decidendi*. That maxim, taken in its literal and unqualified sense, is not likely to be recognized at the present time as a complete statement of the law.

Two theories are prominent: One, that the air space above the earth belongs

¹ See 22 Juridical Rev. 103.

to the public; the other, that it belongs to the landowner. But each theory is subject to provisos and limitations which, in the great majority of cases, would bring about the same result, whichever theory is adopted. The public right, under the first theory, is subject to be exercised with due regard to the interests of the landowner. On the other hand the ownership of the landowner, under the second theory, is burdened by a right of passage for the public. The German Civil Code, Article 905, states that the right of the owner of the land extends to the entire air space above the surface; but adds: "The owner may not, however, forbid interference which takes place at such a height . . . that he has no interest in its prevention."

Mr. Hazeltine inclines to the second theory, qualified as above stated (pp. 76-78). And a similar view is taken by Mr. Valentine.² Whichever theory, with its accompanying restrictions, is adopted, the result is likely to be practically as follows:

(1) If the airship comes in contact with the land, or with objects upon the land, there will be, at the very least, a *prima facie* liability.

(2) If the airship passes over the land at a great height, *e. g.* one mile, without causing any actual damage, there will be no liability.

(3) If the airship passes so near to the land, or under such circumstances as to impair substantially the beneficial user of the land, there will be liability.

Of course the facts can be varied so as to raise some fine points which we do not here discuss. Nor do we consider under what circumstances the action of trespass *quare clausum fregit* would have been an appropriate remedy under the old forms of action.

If damage to land or person results from the use of the airship without negligence or other fault on the part of the navigator, is he absolutely liable? Mr. Hazeltine inclines towards absolute liability (pp. 83-86). Mr. Valentine writing with special regard to Scotch law, takes the opposite view.³ Even upon Mr. Valentine's view, a liberal application of the *res ipsa loquitur* doctrine would often enable a plaintiff to make out a *prima facie* case.

Ultimately, some questions, which are now open ones, will be made the subject of statutory enactments.⁴ Mr. Valentine, however, deprecates the "premature interference of the legislature"; and urges delay until experience has made it plain what the problems are which are important to be thus dealt with.⁵

Mr. Hazeltine has made an excellent book, and must have spent much time in making himself acquainted with recent utterances on this modern topic. The leading theories and arguments are very clearly stated. J. S.

SELECT CASES BEFORE THE KING'S COUNCIL IN THE STAR CHAMBER. Vol. II. A. D. 1509-1544; edited for the Selden Society by I. S. Leadam. (Being Vol. XXV of the publications of the Selden Society). London: Bernard Quaritch. 1911. pp. cxxxiv, 382.

The Selden Society volume for 1910 carries us away again into the realms of economic and institutional history. There is substantially nothing in the volume which makes its appeal on the legal side. The text itself, like that of the preceding volume on the Star Chamber, consists of the petitions and other

² 22 Juridical Rev. 95-96.

³ 22 Juridical Rev. 99-101. Compare Judge Baldwin in 4 Am. J. of International Law, 101-102.

⁴ See Judge Baldwin in 4 Am. J. of International Law, 101; and Mr. Hazeltine's Third Lecture, 128-135.

⁵ See 22 Juridical Rev. 103.

papers in a number of cases addressed to the jurisdiction of the Star Chamber or one of its kindred quasi-courts. These documents are often exceedingly interesting to the antiquarian, but, even in the rare cases where the entire proceedings on the petition are extant, they add nothing to our knowledge of law — if indeed the Star Chamber could in any sense be regarded at this time as a court administering law. The introduction is both learned and interesting, but the only question of law mooted in it during its whole extent of one hundred and thirty pages is concerned with the right to prescribe for a villein in gross. The purpose of the Selden Society is "to encourage the study and advance the knowledge of the history of English Law." It is hardly too much to say that this volume is a valuable contribution to scholarship, but has no tendency to further the objects of the Society. With the Year Books of Edward II issuing at the speed of a snail, with those of Richard II still unpublished after more than five centuries, with the history of our law at its most interesting period still locked up in multitudes of unpublished rolls, and with the generation which instituted the Selden Society passing away without seeing its dream realized, the production of this matter on behalf of the Selden Society tends to make the judicious grieve. We may, however, hope for better things; for the volumes in preparation, besides more Year Books of Edward II, include a second volume of Professor Gross's Law Merchant, and a volume of Select Pleas in Ecclesiastical Courts.

One cannot criticize Mr. Leadam for not doing what he has not professed to do. Regarded as a study in institutional and economic history his Introduction is an excellent piece of work. If a lawyer is not especially interested in whether a suit in the Star Chamber should have begun with a letter of privy seal or a writ of subpoena, or whether it should be addressed to king or chancellor, or whether the members of the privy council and the judges of the common-law courts were real judges or only assessors in this court, these questions are of real and living interest to the antiquarian. And if the lawyer will find nothing new about the origin and development of the law of common, or of forestalling, or of vagabondage, the economic historian will be glad to find that the documents here printed are made the text for interesting essays on the scarcity and prices of corn, butter, and calves, on the inclosure disputes, on the quarrels of merchant and craft guilds, and on municipal expenses. We should be entirely glad to get this good work if it did not prevent us from getting what as lawyers we want even more.

Mr. Leadam's work is done carefully, lovingly, and in a scholarly manner. His proofreader, careful about the exact spelling of the Tudor documents, causes us to rub our eyes for a moment, in the report of an action begun *tempore* Henry VIII, by dating the decree November 7, 1911. Surely no court, even of Dickens' creation, could be so dilatory.

J. H. B.

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No. 6.

THE SCOPE AND PURPOSE OF SOCIO- LOGICAL JURISPRUDENCE.

[*Concluded.*]

III.

SOCIOLOGICAL JURISPRUDENCE.

SOCIOLOGICAL Jurisprudence is still formative. In diversity of view the sociological jurists but reflect the differences that exist among sociologists. This is no more a ground for denying that there is a sociological school or denying that there is a sociological method in jurisprudence, than the differences among philosophical jurists are ground for denying that there is a philosophical method.

In common with sociology, sociological jurisprudence has its origin in the positivist philosophers in the sense that each subject has a continuous development from Comte's positive philosophy. But both have long got beyond this and are now wholly independent of it. Nevertheless, there are those who appear to insist that sociological jurisprudence must be identified with a philosophical jurisprudence of the positivist type.¹ Others, also, because sociological thought went through an anthropological-ethnological stage, both in the social sciences generally and in jurisprudence, assume that sociological jurisprudence can mean only

¹ Berolzheimer, *System der Rechts und Wirthschaftsphilosophie*, II, 385-386; Charmont, *La renaissance du droit naturel*, 122-127.

a science of law based on anthropology and ethnology.² In other words, some insist it must stand for a mechanical interpretation that regards law as the product of an inexorable mechanism of social forces. Others insist that it must stand for an ethnological interpretation; for a science of law developed from comparative study of primitive institutions or for a generalization from the jural materials gathered by a purely descriptive social science.³ Today, such views are held chiefly by the critics of sociological jurisprudence. But they have a certain warrant in an unhappy tendency in the earlier stages of the development of the new school to insist exclusively upon some one phase of social science or some one mode of investigation or some one interpretation. It is to be remembered, however, that all the methods of jurisprudence have suffered from a like tendency; that extreme assertions of an imperative theory at one time brought analytical jurisprudence into disfavor, that historical jurisprudence is now under a cloud because it was so long identified with Savigny's views as to law-making, and that philosophical jurisprudence has still to recover in some countries the ground it lost when it became identified with the metaphysical method of the last century. Sociological jurisprudence did not find itself at once, and some assert it has not yet done so.⁴ It has gone through several stages, of which some have

² Del Vecchio, I presupposti filosofici della nozione del diritto, 86-93.

³ "What we call sociology is often no more than a mass of facts of experience which logically ought to belong to the science of universal comparative law, and, to speak more broadly, to the science of law from which they have only been excluded because of the over-narrow conception which has obtained heretofore. Institutions and phenomena of social life which, considered in a certain stage of evolution or under some better-known aspect, are indubitably of a juridical nature, are cast out of the official bounds of juridical science when they are presented in a more primitive form, among less civilized peoples or even among peoples of a different civilization. For example, a work upon the parental régime and the patrimonial régime of the Papuans or of the Bogos, and perhaps even of the Aztecs or of the Coreans, would have few chances of being taken into consideration by jurists, who do not like to go beyond the limits of the traditional culture. But such a work would easily find asylum in the often chaotic mass of facts and conjectures which we call sociology, which, in its defective systematization bears the mark of the imperfections of contemporary culture. The truth is that the only sociology which has a *raison d'être* is a treatise of the rules of method, common to different sciences, to be observed in the study of human facts." Del Vecchio, Sull' idea di una scienza del diritto universale comparato, 11 (1909).

⁴ "We employ the expression 'science of law' as synonymous with juridical sociology. It is a science that has yet to be constituted." Rolin, *Prolégomènes à la science du droit*, 1.

been outgrown thoroughly, while others are still represented in current discussion. These stages must be distinguished and borne in mind if we are to understand either sociological jurisprudence or its critics. It is true that they can be distinguished only in a broad and general way. As in so many other cases where periods are to be set off, the lines must be drawn somewhat arbitrarily here and there, for the stages merge or overlap, and the whole course of development has not proceeded for half a century. But, with this reservation, there seems good warrant for holding that sociological jurisprudence has gone through three stages and has entered upon a fourth. These may be called (1) the mechanical stage, (2) the biological stage, (3) the psychological stage, and (4) the stage of unification.⁵

1. THE POSITIVISTS — THE MECHANICAL STAGE.⁶

It has been said that Comte's sociology was a "technology of social machinery, a handbook of the soulless forces which turned the wheels of the ages."⁷ Comte was a mathematician. Moreover, in the first half of the nineteenth century the central point in scientific thinking was the mechanism of the physical universe. Men's minds were fascinated by the idea of laws, mathematically demonstrable, which control the operations of nature, and for a season they took, as it were, a mathematical view; they sought to find mathematical or mechanical laws according to which all things came into existence and were governed in their course of existence. This type of thinking is to be seen in the first positive philosophies of law and in the first stage of sociological jurisprudence.⁸ It was the obvious result of the mental bent of the founder of sociology. But in jurisprudence it was especially congenial and so lingered

⁵ So far as they have to do with general sociology, the classification and the discussion following are based upon Small, *The Meaning of Social Science*, 71-85.

⁶ Berolzheimer, *System der Rechts und Wirthschaftsphilosophie*, II, § 44; Gumpowicz, *Philosophisches Staatsrecht* (1877); *Allgemeines Staatsrecht* (3d edition of the former) (1907); *Geschichte der Staatstheorien* (1905) (see especially the appendix, *Zur Kritik der juristischen Methode im Staatsrecht*); Stein, *Die soziale Frage im Lichte der Philosophie* (1897, 2 ed., 1903) (especially the chapter, *Ursprung und sozialer Charakter des Rechts*).

⁷ Small, *The Meaning of Social Science*, 74.

⁸ A good account of this may be found in Carle, *La vita del diritto*, 2 ed., § 229. Compare Korkunov, *General Theory of Law* (transl. by Hastings) 265 *et seq.*

longer than elsewhere because of the influence of the historical school. Like the historical jurist, the first type of sociologist looked at law in its evolution, in its successive changes, and sought to relate these changes to the changes undergone by society itself.⁹ The historical jurist found metaphysical laws behind them. The positivist substituted physical laws. The result was the same. Each eliminated the old idea of right and with it all idealism in jurisprudence or legislation.¹⁰

A later form of what is essentially the same type of juristic sociology is to be seen in attempts to state all jural experience solely in terms of economics. The economic interpretation has been spoken of heretofore. In combination with positivist ideas, it has given rise to a sort of fatalist natural law. The old natural law called for search for an eternal body of principles to which the positive law must be made to conform. This new natural law calls for search for a body of rules governing legal development to which law must and will conform, do what we may. Whatever exists in law exists because of the operation of these rules. The operation of these same rules will change it and will change it in accordance with fixed and definite rules in every way comparable to those which determine the events of nature. The doctrine has been set forth in its most extreme form in America:

"Law is the resultant of the conflict of forces which arises from the struggle for existence among men. Ultimately these forces become fused under the necessity of obtaining expression through a single mouthpiece, and that fusion, effected under this pressure, we call the will of the sovereign. It is, however, the will of a sovereign precisely in the sense that the earth's orbit, which is a resultant of the conflict between centrifugal and centripetal force, is the will of a sovereign. *Both the law and the orbit are necessities*, and the one and the other have a like relation to an abstract idea of right and justice."¹¹

⁹ On this relation of the positivists to the historical jurists, see Charmont, *La renaissance du droit naturel*, 117.

¹⁰ *Id.* 122. A similar coöperation with the type of analytical jurist who eliminates juridical idealism through insistence upon the imperative character of law and hence upon the sovereign will as the ultimate, self-sufficient source of legal rules, would have been possible had the two schools been brought in contact. Indeed a combination of positivism and of social utilitarianism may be seen in Vander Eycken, *Méthode de l'interprétation juridique* (1907).

¹¹ Brooks Adams, in *Centralization and the Law*, 23 (1906).

Again:

"Various forces being always in conflict, they become fused in the effort to obtain expression, and their fusion creates a *corpus juris*, the *corpus inclining in the direction of the predominant force in the precise degree in which it predominates*. . . .

"The sovereign being only a vent or mouthpiece, the form the mouthpiece takes, or the name given it, is immaterial. Whether the social resultant expresses itself through a prophet like Moses, or an emperor like Cæsar, or a moneyed oligarchy like the modern British Parliament, the result is the same. The dominant class, whether it be priests or usurers or soldiers or bankers, will shape the law to favor themselves, and that code will most nearly approach the ideal of justice of each particular age which favors most perfectly the dominant class."¹²

This is precisely the position of the mechanical period of sociology, a period long outgrown in the social sciences other than jurisprudence.¹³ Professor Small says aptly that

"The sociological fashion set by Spencer was to treat social forces as though they were mills of the gods which men could at most learn to describe, but which they might not presume to organize and control."¹⁴

Thus in one of his earlier writings Gumpłowicz, in discussing the aristocratic order, argues that criticism is futile.

"Sociology," he says, "must refrain from all such criticism of nature. For sociology, only the facts and their conformity to laws have an interest." His reason is that "*Social phenomena follow necessarily from the nature of men* and from the nature of their relationships."¹⁵

In this very spirit, the jurist I have been quoting says:

"With the moral or political aspects of this controversy, we, as lawyers, have nothing to do, for professionally the function of the lawyer is to accept that which exists and deal with exigencies as they arise. We are only concerned with the effect of the struggle upon the *corpus juris*,

¹² *Id.* 63-64.

¹³ See Small, *General Sociology*, 80-87.

¹⁴ *Id.* 84. Again: "While the Spencerian influence was uppermost, the tendency was to regard social progress as a sort of mechanically determined redistribution of energy which thought could neither accelerate nor retard." *Id.* 82.

¹⁵ Grundriss der Sociologie, 133 (1885). I have used Professor Small's translation, in *General Sociology*, 86.

since the law, being the resultant of the forces in conflict, must ultimately be directed in the direction of the stronger, and be used to crown the victor.”¹⁶

All that has been said as to the practical effects of the analytical and the historical methods, when made, as they usually come to be, the basis of a theory of legislation, applies with even greater force to this type of sociological jurisprudence.¹⁷ Law is an inevitable resultant; in making or finding it, legislator or judge is merely bringing about “conformity to the *de facto* wishes of the dominant forces of the community.”¹⁸ The eighteenth-century doctrine, although it put the *fundamenta* beyond reach of change, at least moved us to scan the details of the superstructure and to endeavor to make each part conform to the fixed ideal plan. It admitted that legislator and jurist had each a function. The historical school denied any real function to the former. The positivist denies it to the latter. To the doctrine of legislative futility, which he accepts, though for other reasons, he adds a doctrine of juristic futility. Hence the achievements of this school have been purely negative. They have helped to clear away, but they have built nothing. For the “declaration of the dominant social organism by which a legal standard is created or imposed”¹⁹ may or may not establish itself in the legal system. The Roman law of juristic acts has not become the law of the world nor is the Anglo-American law of torts becoming a law of the world because either has behind it a dominant social force. Much that has such a force behind it leaves but a faint mark upon the law. A theory that leaves out of account the quest of jurists and judges for an ideal of an absolute, eternal justice, well or ill conceived, to which they seek to make the rules enforced in tribunals approximate so far as possible, and juris-

¹⁶ Centralization and the Law, 132-133.

¹⁷ The mechanical sociology has been so thoroughly criticized from so many quarters, and by none more effectively than by sociologists themselves, that even its persistence in a type of recent juristic thinking cannot justify giving much space to what is no more than a belated phase. But a reference to James, *The Will to Believe*, 216 (*Great Men and their Environment*), may be worth while.

¹⁸ Holmes, J., in *Lochner v. New York*, 198 U. S. 45, 75, 25 Sup. Ct. 539, 547 (1905). Here, however, the Spencerian jurisprudence is invoked against the traditional historical jurisprudence. The notion that social forces working through legislation cannot make law is met by the proposition that they can and will make the law, the means of expression being wholly immaterial, and that it is not for the lawyer to interfere.

¹⁹ Gareis so defines legislation. *Science of Law* (transl. by Kocourek), 80.

tic tradition, that is traditional principles and traditional modes of reasoning therefrom, ignores the chief influences in determining the bulk of the rules actually in force in any legal system at any given time. No doubt the ideal of justice is affected by training and associations which reflect class-interest. On the other hand the conscious endeavor to adhere to the ideal is a powerful check on the operation of class-interest.²⁰ Self-interest of the dominant class in the community for the time being affects chiefly the imperative element in legal systems, that is, legislation. Perhaps for that very reason legislation, as a means of making law, has played the least part in legal development.²¹

If, however, the earlier type of sociological jurist on one side brought us by another path to the position of the futility of effort to which the historical school had led us, on another side he performed a service which Berolzheimer rightly pronounces invaluable.²² This service was twofold: (1) in displacing the individualist starting-point and the atomistic standpoint of nineteenth-century jurisprudence by insisting upon the importance of the group, of the class, of "the compact plurality,"²³ and (2) in compelling us to relate the law more critically to other social phenomena. In urging that the form of social organization was not an arbitrary and artificial fact, that society was not a mere human invention, that the development of society took place according to fixed principles analogous to those which govern the physical universe, and hence that laws and legal institutions develop in accordance with similar principles, they drove the other schools to seek a broader foundation and furnished much of the impetus which produced the social-philosophical school.

2. THE BIOLOGICAL STAGE.²⁴

In the last third of the nineteenth century many jurists began to look at all things literally or figuratively in terms of biology.

²⁰ See particularly Professor Burdick's demonstration of this in his paper, *Is Law the Expression of Class Selfishness?*, 25 HARV. L. REV. 349.

²¹ An excellent critique of the theory of law as the expression of the interest of the dominant class may be found in Tanon, *L'évolution du droit et la conscience sociale*, 3 ed., 180-189.

²² *System der Rechts und Wirtschaftsphilosophie*, II, 384.

²³ Berolzheimer, *loc. cit.*

²⁴ Berolzheimer, *System der Rechts und Wirtschaftsphilosophie*, II, §§ 47, 51;

The epoch-making work of Darwin had made evolution the central idea in scientific thought. From the natural sciences the conception invaded and remade philology, was applied to the history of social and religious institutions, and ultimately came into jurisprudence. A natural science of the state and a natural science of the law succeeded the attempts to work out a physical science of the state. A biological sociology succeeded the mechanical sociology. For a time, indeed, the two overlapped. This is true of Spencer's sociology, which, as has been pointed out by many critics, was not at all evolutionist.²⁵ It is true also of the first attempts at sociological jurisprudence from the biological standpoint. Jurists were attracted by the conception of natural selection. The struggle for existence seemed to afford a fundamental principle for jurisprudence which confirmed the beliefs they had formed under the influence of the historical school or of the positivists. Accordingly they brought us to the same position to which the latter had led us previously, but by this route: The end of law is to give free play in an orderly and regulated manner to the elimination of the unfit, to further selection by a well-ordered social struggle for existence. Revolt of the social conscience against such theories has been an important factor in the juristic movement for the socialization of law.²⁶

In its biological stage, sociological jurisprudence exhibits four types: (1) a mechanical type, which has just been considered, (2) an ethnological type, (3) a philosophical type, and (4) an organismic type. The three last deserve special consideration.

Attempts to develop and apply theories of evolution led for a time to exaggerated reliance upon primitive law. A school of jurists

Kuhlenbeck, *Natürliche Grundlagen des Rechts*; Matzat, *Philosophie der Anpassung mit besonderer Berücksichtigung des Rechtes und des Staates*; Ruppin, *Darwinismus und Sozialwissenschaft*; Hasse, *Natur und Gesellschaft*; Michaelis, *Prinzipien der natürlichen und sozialen Entwicklungsgeschichte des Menschen*; Coker, *Organismic Theories of the State*, chaps. 3, 4; Tourtoulon, *Principes philosophiques de l'histoire du droit*, 80-173; Letourneau, *Évolution juridique*; D'Aguanno, *La genesi e l'evoluzione del diritto civile*; Cogliolo, *Saggi sopra l'evoluzione del diritto privato*; Cogliolo, *La teoria dell'evoluzione darwinista nel diritto privato*.

²⁵ "While Spencer was popularizing the notion of evolution, he was also circulating a theory of society which was in effect as fatalistic as the hyper-Calvinistic dogma of foreordination. . . . Society, in Spencer's version, was simply a gigantic organism endowed with an unalterable amount of energy, and this energy would inexorably redistribute itself according to laws lodged in itself." Small, *The Meaning of Social Science*, 82.

²⁶ See especially Tanon, *L'évolution du droit et la conscience sociale*, 116-166.

arose who expected study of the social and legal institutions of the most primitive peoples to reveal the fundamental data of jurisprudence and the fundamental laws of jural development. They conceived that they could find in primitive man all the materials which were needed to explain the social man in general, and hence in primitive social institutions the materials needed to explain the legal systems of today. I have referred elsewhere to the writings of this school and to the good work its adherents did in broadening the historical and philosophical schools.²⁷ Here it is enough to say that their influence gave rise on the one hand to attempts to interpret jurisprudence and legal history in terms of race, considered in another connection heretofore,²⁸ and on the other hand to an opinion that the true method of jurisprudence was that which sociologists have called the demographic; that legal science was to be founded upon generalization from a descriptive sociology.²⁹ The kernel of truth in each case is that juristic study in the past, both historical and philosophical, had been too restricted in its materials.³⁰ Beyond this, ethnological and demographic methods are no more the chief tools of the sociological jurists than they have proved to be in the case of the general sociologists. As one of the latter says:

"It is a grotesque hallucination that men in stages of arrested development — men about whom, moreover, all available evidence is woefully meager — furnish the only clues to human nature."³¹

It is no less grotesque to suppose that the social institutions of such men furnish the only or even the chief clues to the principles of legal systems. Yet the reaction recently from the exaggerated

²⁷ 24 HARV. L. REV. 614-617.

²⁸ 25 HARV. L. REV. 165. See also Tourtoulon, *Les principes philosophiques de l'histoire du droit*, 85-86.

²⁹ "There are determinate laws according to which all organic structures, which are formed over men in the human race, are developed, and these laws may be disclosed by comparison of the corresponding periods of development of all the generic organisms upon the earth, living and past. To determine these laws is the next task of the political and legal science of the future. For the determination of these laws, a mighty mass of material lies before us which needs only collection and collation in order to produce the most fruitful ideas for the jurisprudence of the future." Post, *Der Ursprung des Rechts*, 7 (1876).

³⁰ See Del Vecchio, *Sull' idea di una scienza del diritto universale comparato*, 11; Kohler, *Rechtsphilosophie und Universalrechtsgeschichte*, §§ 8, 11.

³¹ Small, *General Sociology*, 100.

claims once made for the so-called ethnological jurisprudence may well have gone too far. Thus it has been said:

"While equally with the individual each race depends on its heredity and bears the consequences thereof, the law is no more individual than any other social fact. It is the product of the group. The thought which emanates from the group is freed from physiological influence, since it emanates from other thoughts and not from an organic body. Consequently race has no influence upon institutions. White, yellow, or black of the same degree of development, placed in the same conditions, would reproduce exactly the same law, while remaining in their private psychology white, yellow, and black."³²

As Tourtoulon says of this, it is true that individual characters combine in the group, but they are not lost there. The argument that seeks to prove that race has nothing to do with law would demonstrate that the laws enacted by an assembly of drunk men would carry no trace of the merely personal drunkenness of each individual.³³ More thorough study is required. But enough has been done at one point to yield valuable results. The problem of the relation of law and mixed races is becoming acute in some parts of the world, and the effect upon the law of a mixed race, whose members are moved by diverse ideals and are incapable of concerted action toward a common goal, is becoming manifest.³⁴ Comparative study of primitive law is showing also that the relativity of jural principles has been much overrated since the downfall of the law-of-nature school. After a comparison of the laws of Hammurabi (B. C. 2285-2242) with the Salic Law (A. D. 466-511), Fehr says:

"Over and above race and nation there must be conditions of general validity governing the production of law. The fundamental forms of spiritual social life, from which the law springs, are more independent of race and nation than the historical school conceded. The likeness of law in cases of the most striking unlikeness of race can only be explained by a common human basis."³⁵

The philosophical type of bio-sociological theory of law proceeds in one form or another upon the idea of selection. In one form, the development of law is conceived as resulting from a conflict or

³² Tourtoulon, *Les principes philosophiques de l'histoire du droit*, 85, stating Durkheim's view.

³³ *Id.* 86.

³⁴ *Id.* 125.

³⁵ Hammurapi und das Salisches Recht, 136.

competition of legal institutions or of legal doctrines, from which those emerge which are most adapted to further the progress of the race. Accordingly law is held to be an aggregate of the means by which each group protects itself against hindrances to its continuance and to its progress found in the actions of certain of its members or in the hostility of other groups.³⁶ A complete legal system is worked out in this way after a fashion that reminds one forcibly of the method of the metaphysical jurists. Thus with Richard the starting-point in every case is prohibitive intervention designed to obviate conflict. For example, society forbids its members to possess themselves by force or fraud of a good already possessed; it punishes theft, robbery, and plundering and so creates ownership. In the same way contract is developed by opposition from measures taken to repress deceit, fraud, abuse of trust and the like, the validity of an agreement concluded honestly and fairly being deduced ultimately by way of consequence.³⁷ This type of sociological jurisprudence is quite as barren as the metaphysical jurisprudence which it imitates. Indeed, that sociological jurisprudence should take such a turn at all is but one more illustration of the influence of propinquity upon juristic thought. We must remember that the metaphysical school was still alive and not without vigor in France at the very end of the nineteenth century.

In another form of the philosophical type under consideration race-conflict or conflict of race ideas is made the basis. Enough has been said of ethnological interpretations heretofore. In still another form, which has had no little currency, class-conflict is taken as the basis, not, however, as in the mechanical sociology, by conceiving of class-conflict as fixing mechanically the whole

³⁶ Richard, *Origines de l'idée du droit*, §. Compare: "To my mind sociology is the study of adaptations of men (these are principally mental adaptations) to life in society. Law is one of these adaptations; the one which has for its end to combat by constraint the effects or the causes of certain defaults of adaptation which are considered intolerable. Juridical sociology is, then, the *study of the mental adaptations of men living in society, which adaptations are destined to struggle by means of constraint against certain inadaptations of the same men*. Considered from this point of view, the science of law appears a chapter of the natural history of man." Rolin, *Prolégomènes à la science du droit*, 4-5. The italics are in the original.

Korkunov gives us the best version of this type of theory: "Legal development as a whole is a struggle of old law, unconsciously established, against new law consciously adopted." *General Theory of Law* (transl. by Hastings) 165.

³⁷ Richard, *Origines de l'idée du droit*, 54-55.

content of legal systems, but by conceiving of it as resulting in a process of selection by which, as it were, the unfit institution and the unfit rule are weeded out or by which the race or nation falls behind or is eliminated which does not develop and preserve the fit institution and the fit rule.³⁸ The idea of selection through class-conflict has been urged chiefly by Vaccaro.³⁹ In his view, law grows out of the struggle of social classes for supremacy. He does not deduce therefrom, however, that the sole function of law is to express the will of the dominant class for the time being — "to crown the victor."⁴⁰ In quite another spirit from those who adhere to the imperative form of the economic interpretation,⁴¹ he says that its function is to adapt men to the social environment by determining the conditions of their coexistence.⁴² This is simply a sociological version of an idea which is to be found frequently in the writings of the metaphysical and historical jurists.⁴³ The most important difference is in the insistence upon relativity. Thus, Vaccaro says:

"The conditions of coexistence imposed by law are not those that ought to be in order to assure the greatest possible prosperity of all the associates, but *those which result from the action and reaction of men as they are at a given historical moment.*"⁴⁴

³⁸ "The institutions of civilized peoples have been considered as the product of a selection because societies which have not disciplined or organized themselves, which have practiced theft, violence, assassination, have been eliminated." Charmont, *La renaissance du droit naturel*, 119. It is noteworthy that Montesquieu had an idea not unlike this. See his description of the Troglodytes, who perished utterly because they wilfully violated contracts. *Lettres Persanes*, Lettre XIV *et seq.*

³⁹ *Le basi del diritto e dello stato* (1893), translated by Gaure as *Les bases sociologiques du droit et de l'état* (1898). For an appreciation and critique, see Gumpłowicz, *Geschichte der Staatstheorien*, § 137.

⁴⁰ Brooks Adams in *Centralization and the Law*, 132.

⁴¹ Here again the influence of propinquity upon juristic thought is manifest. Brooks Adams wrote in a country where analytical jurisprudence was one of the two prevailing methods. His lectures are full of attacks upon the orthodox analytical position. Yet his sociological theory is essentially analytical. Vaccaro wrote in a country where natural law was far from dead and the analytical theory almost unheard of.

⁴² *Les bases sociologiques du droit et de l'état*, 452.

⁴³ *E. g.*: — "The sum of the conditions of social co-existence with regard to the activity of the community and of individuals." Pulszky, *Theory of Law and Civil Society*, 312 (1888). "The power of coercion . . . necessary for the harmonious co-existence of the individual with the whole." Lioy, *Philosophy of Right with Special Reference to the Principles and Development of Law* (transl. by Hastie), II, 122 (1891).

⁴⁴ *Les bases sociologiques du droit et de l'état*, 452. The point will be more clear if

Perhaps enough has been said to indicate that this idea of relativity, valuable as it is in enabling us to combat absolute ideas of justice and hard and fast schemes of supposed fundamental jural principles, may itself be carried too far. No action and reaction of men as they have been at any given moment since republican Rome will explain the long history of the doctrine of impossible and illegal conditions precedent in testaments; no theory of the power of a creditor class will explain the *beneficium excussionis*, its long and involved history in the modern world, and its tendency to disappear in favor of creditors at the very time when both law and public opinion are becoming more and more tender of debtors. But such matters are of more importance in legal systems and have more significance for jurisprudence than the short-lived penal legislation from which most of the data for the theories of class-struggle as the determining factor in legal history have been drawn. Such theories, however, have had an important consequence in directing attention to the unequal operation of doctrines derived by the nineteenth-century method of abstraction, when applied to a society in which industrial progress has resulted in sharply differentiated classes. A group of socialist-jurists has worked upon this matter with zeal and effect.⁴⁵

Foremost among those who have examined actual legal systems with a view of ascertaining the relation of existing rules and doctrines to the interests of the industrial class is Anton Menger.⁴⁶ The law of modern Continental Europe was reformulated in codes which, except in the case of the new code of the German Empire, for the most part antedate modern industrial conditions. Hence in this juristic new start the laborer was not taken into account at all.⁴⁷

we compare this with Trendelenburg's formula: "The sum of those *universal* determinations of action through which it happens that the ethical whole and its parts may be preserved and further developed." *Naturrecht*, § 46.

⁴⁵ See Berolzheimer, *System der Rechts und Wirthschaftsphilosophie*, § 40; Charmont, *Le droit et l'esprit démocratique*, chap. 2 (la socialisation du droit); Gumpłowicz, *Die soziologische Staatsidee*, 115 *et seq.*; Stein, *Die soziale Frage im Lichte der Philosophie*, 2 ed., 336 *et seq.*

⁴⁶ *Das Recht auf den vollen Arbeitsertrag* (1886, 3 ed., 1904); *Das bürgerliche Recht und die besitzlosen Klassen* (1889, 3 ed., 1904); *Ueber die sozialen Aufgaben der Rechtswissenschaft* (1895, 2 ed., 1905).

⁴⁷ Compare Glasson's observations upon the French code: *Le code civil et la question ouvrière*, 6. Also Tissier, *Le code civil et les classes ouvrières*, *Livre du centenaire du code civil*, 71-94.

Menger's comparisons of the interests which the law secures with those which it leaves unsecured showed that a situation had arisen for which the codes had made no provision. Indeed from the standpoint of class-struggle, it is said that the working class was left wholly out of the reckoning in the drawing up of the codes. This can hardly be maintained. The French code, which served as a model, was based chiefly upon the juristic writing of the century before and represents the law of a period when there was no such class to attract attention. But it is true of the codes of Continental Europe, as of our Anglo-American common law, that their abstractions, proceeding upon a theoretical equality, do not fit at all points a society divided into classes by conditions of industry. Much of what has been written in Europe from this standpoint might have been written by American social workers. Thus:

"Insanitary housing, exorbitant rent, payment in advance, subjection to shop regulations, fixing of the method and the duration of work, fines, the sweating system,—all is covered by the fiction of liberty of contract. Meanwhile in fact liberty is suppressed."⁴⁸

In compelling study of the relation of law to social classes and so making for a socialization of the law, the group of socialist jurists has done a considerable service.

The organismic type of bio-sociological theory of law is in reality a philosophical theory couched in bio-sociological terminology. Thus Fouillé says:

"The laws of natural history are valid for nations, for at the same time that a nation is a work of voluntary consent it is also a natural organism."⁴⁹

Hence, he holds, the same laws of natural history obtain for national institutions, including legal systems. In application, however, his method is that of the metaphysical jurists, and his formula of law —

"The concrete and complete law, at the same time ideal and real, becomes *the maximum of liberty, equal for all individuals*, which is compatible with the maximum of liberty, of force and of interest for the social organism "⁵⁰ —

⁴⁸ Andler, preface to the French version of Menger's *Recht auf den vollen Arbeitsertrag* (*Droit au produit integral du travail*).

⁴⁹ *L'idée moderne du droit*, 6 ed., 402 (1909).

⁵⁰ *Id.* 394.

is but a familiar formula of the metaphysical school superficially socialized.

So Kuhlenbeck's essay at a "legal-philosophical and critical estimation of the theory of descent"⁵¹ is to be classed with philosophical rather than with sociological systems.

Now that "the heroic period of socio-biology" in jurisprudence has passed⁵² and this phase of sociological jurisprudence comes to be reviewed, the liberalizing effect of the idea of evolution, as soon as it was freed from the hard and fast mechanical systems of those who first applied it, and the loosening effect of biological terminology upon the absolute ideas which the historical school had left unshaken and upon some which that school had set up of its own motion, must be conceded to have marked a step forward. Beyond this, little has been achieved. Biological facts are indirectly and remotely among the causes of law. But they are not the proximate causes which the jurist must investigate. Justice, in the sense of the end of legal administration, public order, the jural order, or *Friedensordnung* as the Germans put it, may be regarded as a sort of directing and debrutalizing of the process of selection, a mode of requiring the struggle for existence to be carried out according to rule. Criminal law particularly may be looked upon as performing a function of selection. Yet when we have looked at these institutions in this way we have not been looking at those features which are significant for sociology or for jurisprudence. Tourtoulon says rightly:

"The idea of selection does not suffice to constitute the basis, theoretical or practical, of any part of the law."⁵³

3. THE PSYCHOLOGICAL STAGE.⁵⁴

Three influences combined to turn the attention of sociological jurists toward psychology. They may be summed up in three

⁵¹ *Natürliche Grundlagen des Rechts und der Politik. Ein Beitrag zur rechts-philosophischen und kritischen Würdigung der sogenannten Deszendenztheorie* (1905).

⁵² These words are Tourtoulon's. *Les principes philosophiques de l'histoire du droit*, 82.

⁵³ *Id.* 166.

⁵⁴ Berolzheimer, *System der Rechts und Wirthschaftsphilosophie*, II, § 49; Tarde, *Les lois de l'imitation*, chap. 7, § 4, Parsons' transl. 310-322 (1890, 2 ed. 1895); Tarde,

names, Gierke, Ward, and Tarde. More precisely they were (1) study of group personality and group will, leading to a psychological movement in legal and political philosophy, (2) the complete change in method in the social sciences which resulted from Ward's thesis that "psychic forces are as real and natural as physical forces . . . and that they are the true causes of all social phenomena,"⁵⁵ and (3) Tarde's demonstration of the extent to which imitation is a factor in the development of legal institutions and his working out of the psychological or sociological laws of imitation.

As a Germanist, Gierke⁵⁶ was at outs with the orthodox historical school, which was then wholly Romanist. To this fortunate circumstance we may owe it, in part at least, that while his method is primarily and truly historical, he had broken with the metaphysics of the historical school as well as with its learned tradition. Hence, in contrast with the method, then prevalent, of beginning all juristic discussion with the individual will, he struck the sociological note in his first sentence:

"What man is, he owes to the union of man with man. The possibility of creating associations, which not only enhance the power of those who live contemporaneously but above all, through their permanence, surviving the personality of the individual, bind the past of the race to those to come, gives us the possibility of the development of history."⁵⁷

His theory of associations thus became as strong an attack upon the individualist jurisprudence of the nineteenth century upon one side as Jhering's theory of interests was upon another. That the group or association has a real personality, that in fact and not merely in legal fiction it is more than an aggregation of individuals, that there is a group will, which is something real, apart from the wills of the associated individuals, that the law does not create but merely recognizes personality, exactly as in the case of the human being, and does not create but merely gives legal effect

Les transformations du droit (1894, 6 ed. 1909); Tourtoulon, *Les principes philosophiques de l'histoire du droit*, 174-331 (1908); Tanon, *L'Évolution du droit et la conscience sociale*, 3 ed., 143-176 (1911); Vanni, *Lezioni di filosofia del diritto*, 3 ed., 29 *et seq.* (1908, 1 ed. 1901).

⁵⁵ Small, *The Meaning of Social Science*, 84; Ward, *Dynamic Sociology*, I, 457 *et seq.*

⁵⁶ *Das deutsche Genossenschaftsrecht*, vol. I, 1868, vol. II, 1873, vol. III, 1881.

⁵⁷ *Id.* I, 1.

to the powers of action of the group or association, again exactly as in the case of the human being, — these ideas of Gierke's not only revolutionized theories of the juristic person but they compelled new theories of the greatest of all these groups, namely, the state.⁵⁸ Accordingly the group will became no less important — indeed in a sense more important — than the individual will; group motives had to be sought and explained no less than individual motives. As Wundt put it, the state is not necessary to law. What is necessary is an association or society which is capable of producing a collective will because of correspondence of ideas and interests.⁵⁹ The significance of this proposition for the theory of International Law is manifest.

One effect of the shifting of emphasis in the philosophy of law from individual will to group will, and so from individual psychology to group psychology, was to give prominence to the idea of relativity, which, as we have seen, other modes of juristic thought were fostering at the same time. Wundt, in a brief sketch of a philosophy of law, lays especial stress upon this. The development of law, he says, is a process of the psychology of peoples.⁶⁰ Hence, like all psychical creations, law has been and will forever continue to be in a process of becoming. He adds:

“Thus we see that law is as variable as man himself; and the attempt to include it in an abstract and absolutely valid system has about as much chance of success as the attempt to introduce an universal language.”⁶¹

Another effect was to give a social-psychological turn to theories of legal obligation, or, in other words, to produce social psychological theories of sanction. Thus Jellinek, who defines society as the “aggregate of the psychological relations between men which are manifest in the external world,”⁶² begins with the analytical view which characterizes all recent German writing. The essential marks of rules of law, he says, are three:

⁵⁸ Gierke, *Die Grundbegriffe des Staatsrechts und die neuesten Staatstheorien*, *Zeitschrift für die gesamte Staatswissenschaft*, XXX, 304. See also his *Die Genossenschaftstheorie und die deutsche Rechtssprechung* (1887), particularly pp. 10 *et seq.*

⁵⁹ *Logik*, II², 2 ed., 543 (1895).

⁶⁰ *Id.* 533.

⁶¹ *Ethics* (transl. by Titchener and others), III, 161 (1892).

⁶² *Allgemeine Staatslehre*, 2 ed., 89 (1905). This was also in the first edition (1900).

"1. They are norms for the external conduct of men toward one another. 2. They are norms which proceed from a known external authority. 3. They are norms whose binding force is guaranteed by external power."⁶³

But what makes a rule law, he says, is that it obtains as a rule, and what makes a right is that the rule which stands behind it obtains in action. This means that its psychological efficiency is guaranteed, that is, that the authority which has prescribed it is so backed by social-psychological power as to be in a position to give effect to the rule, as a motive for action, in spite of counteracting individual motives.⁶⁴ Jellinek's doctrine of the relation of state to law and of the nature of sanction is a needed corrective of the imperative ideas which have sprung up in the wake of German legislation. His conception of the social-psychological guarantee, whereby rules are made effective and so are made law, is one of the most important contributions of the psychological movement.⁶⁵

While juristic thought was developing a psychological tendency from within, a psychological movement was going on without which was presently to develop this tendency still further and to give it a new direction. In the biological stage, as we have seen, the static conception of the mechanical sociology persisted. The change of front which involved complete abandonment of that conception begins with Ward.⁶⁶ As far back as 1883, when Spencer's sociology was in possession of the field, Ward took the position that social forces were essentially psychic.⁶⁷ Whereas social science had been content to study the laws by which social progress took place and had believed it possible to do no more than to observe nature realize itself, Ward conceived that nature might realize itself by "action of its conscious parts upon its unconscious

⁶³ Jellinek, *Allgemeine Staatslehre*, 325.

⁶⁴ *Id.* 326.

⁶⁵ For numerous examples from American law of today of the way in which judge-made as well as statutory rules fail because they have no such guarantee, see my paper, *Law in Books and Law in Action*, 44 *Am. L. Rev.* 12.

⁶⁶ *Dynamic Sociology* (1883); *Pure Sociology* (1903); *The Psychic Factors of Civilization* (1901); *Applied Sociology* (1906). For a juristic discussion of Ward, see Gumpowicz, *Geschichte der Staatstheorien*, §§ 119-120.

⁶⁷ *Dynamic Sociology*, chaps. 5, 7, 9, 11. "The truth comes forth that the social forces are essentially psychic. It is this that has made it imperative that the foundations of sociology be sought in psychology." *The Psychic Factors of Civilization*, 120.

parts.”⁶⁸ Hence it is not enough to study and observe: “the attitude of man toward nature should be two-fold: first, that of a student; second, that of a master.”⁶⁹ We must study and thus come to know the efficient social forces, but we do this not to know beforehand the results of their inexorable working, but to be able ultimately to apply them consciously to social ends.⁷⁰ Summarily stated, his doctrine was that sociology rests upon psychology, and not directly upon biology,⁷¹ that we must know not only how non-sentient nature works, but “how mind combines its work with the non-sentient factors of human conditions,”⁷² and that this part of nature may be harnessed to man’s use as so much of physical nature has been so harnessed. Perhaps nothing has done so much to create world-wide dissatisfaction with law and to make problems of law reform acute almost everywhere as the persistence in juristic thinking and judicial decision of nineteenth-century ideas of the futility of effort at a time when the efficacy of effort had become part of the sociological and the political creed.⁷³

A more immediate effect upon jurisprudence was produced by the work of Gabriel Tarde (1843-1904).⁷⁴ Tarde, a trained lawyer, was *juge d’instruction* for eighteen years, afterwards head of the statistical department of the French ministry of justice, and professor of philosophy in the Collège de France. Besides the works referred to in the note, he wrote a Penal Philosophy, which is translating for the Modern Criminal Science Series. His most important writings have to do with philosophy and sociology. While Ward was showing us that the psychic factors are those of

⁶⁸ Small, *General Sociology*, 86.

⁶⁹ *Dynamic Sociology*, II, 11.

⁷⁰ “The most important principle of social dynamics is effort. But its dynamic effect, from the standpoint of pure sociology, is unconscious, unintended, and undesired. The social development that results from it is spontaneous. Applied sociology assumes that effort is consciously and intentionally directed to the improvement of social conditions.” *Applied Sociology*, 13.

⁷¹ *The Psychic Factors of Civilization*, chap. 18.

⁷² Small, *General Sociology*, 85.

⁷³ “Every beneficent change in legislation comes from a fresh study of social conditions and of social ends, and from some rejection of obsolete law to make room for a rule which fits the new facts. One can hardly escape from the conclusion that a lawyer who has not studied economics and sociology is very apt to become a public enemy.” Professor Henderson in *American Journal of Sociology*, XI, 847.

⁷⁴ For Tarde’s writings that bear more immediately upon jurisprudence see *supra*, note 54.

first importance, Tarde was studying these factors and seeking to discover the fundamental principle by which they are governed. This principle, as one of cosmic philosophy, he took to be universal, endless repetition, of which the social form is imitation. Reviewing the development of civilization, the evolution of language, art, law, and institutions, he found that imitation was a constant factor. Accordingly he undertook to find the psychological and sociological laws of imitation.

Tarde was the first sociologist to give us an adequate theory of what is in reality the most significant part of legal systems. To the lay eye, legislation commonly occupies the whole stage. Tarde, as a practical lawyer, knew the importance of doctrinal writing and judicial decision, of the traditional element in law, of the modes of juristic thinking that give continuity to legal systems. Although rules have disappeared, have altered, have sprung up, developed and decayed, and from small beginnings have grown into whole departments of the law since the seventeenth century, our common law has a real unity from the age of Coke to the present. As a mode of thinking, as a mode of reasoning upon legal subjects, it is the same in England, the United States, Canada, and Australia, the same in substance in one century as in the next. In the same way the Roman tradition has continuity and essential identity from the third century to the twentieth, and as that tradition gives form and color to all the new elements in the law of Continental Europe, so with us the common-law tradition has put its mark upon equity, admiralty, and the law merchant, and has been able to fit legislation, fashioned by whatever force, into its own system. Explanation of this toughness of jural tradition is much more worth while than theories of formal law-making.

To sum up, the earlier psychological movement made possible a reconciliation of Jhering's insistence upon conscious law-making and the historical view, Ward gave the deathblow to the static theory of the positivists and Tarde gave us the leading principle by which, subconsciously, the direction of law-making and law-finding is chiefly determined. Not only does social psychology occupy a chief place in recent sociological jurisprudence⁷⁵ but modes of

⁷⁵ Bruegilles, *Le droit et la sociologie*, chap. 6; *Les phénomènes interpsychologiques* (1910).

juristic thought, the world-view ⁷⁶ of judges and doctrinal writers and the psychology of juridical methods are coming to be the subjects of special study.⁷⁷ With us, unhappily, what studies of the sort have been attempted have been the work of laymen. Such a book as Professor Ross' *Social Psychology*, written by a lawyer with Anglo-American law for its subject, would be worth many volumes of the conventional analytical and historical jurisprudence.

4. THE STAGE OF UNIFICATION.⁷⁸

At the very end of the last century sociologists were coming to see that no one of the methods theretofore worked out was the whole of sociology and that none of the solving ideas put forward was equal to the task of unfolding all the social sciences.⁷⁹ A few years later, Ward enumerated twelve "leading sociological conceptions or unitary principles," each of which had been "put forward with large claims to being in and of itself the science of sociology."⁸⁰ In another place, after repeating this enumeration, he said:

"No single one of these conceptions is to be rejected. All are legitimate parts of the science. . . . All these various lines, together with all others that have been or shall be followed out, may be compared to so many minor streams, all tending in a given direction and converging so as ultimately to unite in one great river that represents the whole science of sociology as it will be finally established."⁸¹

⁷⁶ I adopt Baldwin's rendering of *Weltanschauung*, *Dictionary of Philosophy and Psychology*, II, 822.

⁷⁷ Wurzel, *Das juristische Denken* (1904); Bozi, *Die Weltanschauung der Jurisprudenz* (1907); *Les méthodes juridiques* (lectures by a number of French professors of law, 1911).

⁷⁸ Bruggelles, *Le droit et la sociologie* (1910); Ward, *Contemporary Sociology* (1902); Gumpłowicz, *Geschichte der Staatstheorien*, § 122 (1905); Small, *General Sociology*, 90-97 (1905); Small, *The Meaning of Social Science*, Lects. I, III, X (1910).

⁷⁹ See the papers cited in Small, *General Sociology*, 90, note 39.

⁸⁰ *Contemporary Sociology* (reprint of three papers published in *American Journal of Sociology*, vii, 475 *et seq.*, 629 *et seq.*, 749 *et seq.* "Thus designated these unitary principles, forming the basis of so many systems or schools of sociology, were the following: — Sociology as: I, Philanthropy; II, Anthropology; III, Biology (the organic theory); IV, Political Economy; V, The Philosophy of History; VI, The Special Social Sciences; VII, The Description of Social Facts; VIII, Association; IX, The Division of Labor; X, Imitation; XI, Unconscious Social Constraint; XII, The Struggle of Races." *Pure Sociology*, 13-14 (1903). It is worth noting that all of these except the first and the fifth, in one form or another, have been put forward in the same way in sociological jurisprudence.

⁸¹ *Pure Sociology*, 14.

Presently it was seen also that not only was it needful to combine the several methods that had been employed in sociology and to unify the science, but that it was equally needful to put the science into relation with the other social sciences; to unify the social sciences by recognizing that they are "merely methodological divisions of societary science in general."⁸²

Both of the foregoing conceptions have come into sociological jurisprudence. It is now recognized that each of the directions which sociological jurisprudence has taken has something for the science as a whole and that no one of them must be pursued exclusively and undeviatingly.⁸³ It has been felt for some time that the entire separation of jurisprudence from the other social sciences, the leaving of it to itself on the one hand and the conviction of its self-sufficiency on the other hand, was not merely unfortunate for the science of law on general considerations, in that it necessitated a narrow and partial view but was in large part to be charged with the backwardness of law in meeting social ends, the tardiness of lawyers in admitting or even perceiving such ends, and the gulf between legal thought and popular thought on matters of social reform.⁸⁴ Not a little of the world-wide discontent with our present legal order is due to modes of juristic thought and juridical method which result from want of "team-work" between jurisprudence and the other social sciences.⁸⁵ The first movement toward a better relation between these sciences grew out of the political interpretation of jurisprudence and of legal history, for which the historical school stood, especially in England. Jurisprudence and politics were thus brought into coöperation. In the same way the culture interpretation, adhered to by the Neo-Hegelians, has led to a

⁸² Small, *General Sociology*, 91. "Social science cannot be many. It must be one. The next stage of social science must be marked by a drawing together of the parallel or diverging lines of research in which it has been broken up. We must use the knowledge which we have already gained of parts or aspects or details of human experience to construct a more adequate general survey of the whole of human experience." *The Meaning of Social Science*, 87.

⁸³ Bruggelles, *Le droit et la sociologie*, 160 *et seq.*

⁸⁴ Tarde, *Les Transformations du droit*, Introduction.

⁸⁵ Ross, *Social Psychology*, 223-224; Ely, *Economic Theory and Labor Legislation*, 18; Bruce, *Laissez Faire and the Supreme Court of the United States*, 20 *Green Bag* 546. "So far as any direct influence upon our courts is concerned, our modern textbooks upon economics might as well be written in Chinese." Humble, *Economics from a Legal Standpoint*, 42 *Am. L. Rev.* 379.

closer relation between jurisprudence and economics, as shown by treatment of the philosophy of law and the philosophy of economics as parts of a larger subject.⁸⁶ The unity of the social sciences and the impossibility of a self-centered, self-sufficing science of law are now insisted upon by sociological jurists.⁸⁷ But much remains to be done everywhere in this direction,⁸⁸ and in America we have yet to make the very beginning, except as we have learned to harness history for the purposes of legal science. For it is not long since a seventeenth-century legal history was as orthodox as an eighteenth-century philosophy of law and nineteenth-century economics are still. Freeman tells of a teacher of law who

"required the candidates for degrees to say that William the Conqueror introduced the feudal system at the great Gemot of Salisbury in 1086."

When the historian protested, the lawyer replied in all sincerity that he was examiner in law, not in history:

"Facts might be found in chronicles, but law was to be found in Blackstone; it was to be found in Blackstone as an infallible source; what Blackstone said, he, as a law-examiner could not dispute."⁸⁹

⁸⁶ Berolzheimer, *System der Rechts und Wirthschaftsphilosophie*, ii, viii. The very title of Dr. Berolzheimer's book is suggestive. Compare also the title and scope of the *Archiv für Rechts und Wirthschaftsphilosophie*. In the same spirit, Professor Humble says: "In spite of this indifference and lack of co-operation . . . the subject matter of the two studies [*i. e.* law and economics] is largely common ground." *Economics from a Legal Standpoint*, 42 *Am. L. Rev.* 379, 380.

⁸⁷ "The error of the classical conception was in looking upon law as a science isolated from the others, self-sufficient, furnishing a certain number of propositions the combination whereof ought to provide for all needs. In reality the law is only a resultant. Its explanation is outside of itself. Its sources must be sought elsewhere." Vander Eycken, *Méthode positive de l'interprétation*, 112 (1907). "Nothing is more fallacious than to believe that one may give an account of the law by means of the law itself." Roguin, *Le règle de droit*, 8 (1905). See also Bosanquet, *Philosophical Theory of the State*, 36 *et seq.* (1899).

⁸⁸ Kantorowicz, *Rechtswissenschaft und Soziologie*, 8 (1911).

⁸⁹ Freeman, *Methods of Historical Study*, 73-74. Compare with the foregoing: "The report of the commission . . . is based upon a most voluminous array of statistical tables, extracts from the works of philosophical writers and the industrial laws of many countries, all of which are designed to show that our own system of dealing with industrial accidents is economically, morally, and legally unsound. Under our form of government, however, courts must regard all economic, philosophical, and moral theories, attractive and desirable though they may be, as subordinate to the primary question whether they can be molded into statutes without infringing upon the letter or spirit of our written constitutions." *Ives v. South Buffalo R. Co.*, 201 *N. Y.* 271, 287, 94 *N. E.* 431, 437 (1911). Of course, economic, moral, and philosophical

Holmes and Bigelow and Thayer and Ames and Maitland have made us wiser with respect to law and history. But it is still good form for the lawyer to look upon our eighteenth-century Bills of Rights as authoritative text-books of politics,⁹⁰ of ethics,⁹¹ and of economics.⁹²

THE PRESENT STATUS OF SOCIOLOGICAL JURISPRUDENCE.⁹³

The main problem to which sociological jurists are addressing themselves today is to enable and to compel law-making, and also

theories of today could have no more bearing on the reading of the text than historical study of today, in the mind of Freeman's teacher, could have upon the legal dogma as to what was legal history!

⁹⁰ *People v. Coler*, 166 N. Y. 1, 14, 59 N. E. 716, 720 (1901); *Low v. Rees Printing Co.*, 41 Neb. 127, 135, 59 N. W. 362, 364 (1894); *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 530, 537, 90 N. W. 1098, 1101 (1902).

⁹¹ *Durkin v. Kingston Coal Co.*, 171 Pa. St. 193, 202, 33 Atl. 237, 238 (1895); *Hoxie v. New York, etc. R. Co.*, 82 Conn. 352, 359; 73 Atl. 754, 757 (1909). I am indebted to Professor Munroe Smith for calling my attention to a notable example in the minority report of a committee of the Bar Association of the City of New York upon a proposition for amendment of the state constitution so as to permit the enactment of a Workmen's Compensation Act. The report says: "We must begin by ourselves understanding that the constitutional provisions which are contained in our bill of rights in the state and federal constitutions are moral principles, as weighty in moral authority and as vital to the safety of society as any that have ever been promulgated, not even excepting the golden rule. After that, we must teach the people. We must make *them* understand that constitutional rights are moral rights, and that whatever experiments they may try in modes of social organization, they must never try any experiments which will imperil those moral rights. We must make them understand that once they tamper with the security of those moral rights they will, like Samson, wreck the social structure and be themselves crushed in the ruins. There is no duty resting upon the lawyers of today which is higher than the duty to resist to the uttermost any effort at amendment of our constitutions which shall endanger in the slightest degree the moral principles in the bill of rights, or which shall permit any man's property to be taken under any pretext without due process of law, or which shall extend to any man anything less than the absolutely equal protection of the law." Report of Special Committee . . . to consider the Question of an Amendment to the Constitution of the State of New York Empowering the Legislature to Enact a Workmen's Compensation Law (Dated 27 December, 1911) p. 17.

⁹² "A law that restricts the freedom of contract on the part of both the master and servant can not in the end operate to the benefit of either." *People v. Coler*, 166 N. Y. 1, 16, 59 N. E. 716, 721 (1901). See for many other examples the papers referred to *supra*, note 85.

⁹³ Ehrlich, *Soziologie und Jurisprudenz* (1906); Kantorowicz, *Rechtswissenschaft und Soziologie* (1911); Kelsen, *Ueber Grenzen zwischen juristischer und soziologischer Methode* (1911); Brueglles, *Le droit et la sociologie* (1910).

interpretation and application of legal rules, to take more account, and more intelligent account, of the social facts upon which law must proceed and to which it is to be applied.⁹⁴ More specifically, they insist upon six points:

(1) The first is study of the actual social effects of legal institutions and legal doctrines. Thus Kantorowicz says:

"I advise one who does not believe this to read a section of the German Civil Code in the following way: Let him ask himself with respect to each statement . . . what harms would social life undergo if instead of this statement the opposite were enacted. And then let him turn to all text-books, commentaries, monographs, and reports of decisions and see how many questions of this sort he will find answered and how many he will find even put. Characteristically, also, statistics upon civil law are almost wholly wanting, so that we can be sure of almost nothing as to the social function of civil law, particularly as to the measure of its realization. For instance, we only know that the Civil Code governs five forms of matrimonial property régime, but we have not the least suggestion in what numerical relation and in what geographical subdivisions the several forms occur now in social life."⁹⁵

⁹⁴ "No glance strays over this Chinese wall into the region of social life for the regulation whereof these precepts were promulgated; that troubles the orthodox jurists as little as the uses which the builders of a machine may chance sometime to make of his formula troubles the pure mathematician." Kantorowicz, *Rechtswissenschaft und Soziologie*, 5. "So this means only remains: look over the Chinese wall into the region of social life in which it is the task of every rule of law to bring forth some sort of consequences." *Id.* 7. See also Vander Eycken, *Méthode positive de l'interprétation*, 109 *et seq.*; Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 467.

Perhaps the most effective study in this direction has been done in Professor Ehrlich's "Seminar for Living Law." See Ehrlich, *Die Erforschung des lebenden Rechts*, *Schmollers Jahrbuch*, xxxv, 129 (1911). With us, a sign of a new tendency to take more account of the social facts involved in application of legal rules may be seen in the opinion of Winslow, C. J., in *Borgnis v. Falk Co.*, 133 N. W. 209 (Wis., 1911). Reference should be made also to the well-known briefs of Mr. Brandeis in *Muller v. State of Oregon*, 208 U. S. 412, 28 Sup. Ct. 324 (1908), and *Ritchie v. Wayman*, 244 Ill. 509, 91 N. E. 695 (1910), and to the brief in *State v. Cramer* (Supreme Court of Ohio, Jan. 16, 1912). See Boyd, *The Economic and Legal Basis of Compulsory Industrial Insurance for Workmen*, 10 *Mich. L. Rev.* 345.

⁹⁵ *Rechtswissenschaft und Soziologie*, 8. In the United States we are even more backward. Proper statistics of the administration of civil justice, which are a prerequisite of intelligent reform of procedure, are not to be had except for the Municipal Court of Chicago. As to criminal law, see Robinson, *History and Organization of Criminal Statistics in the United States* (1911); Mayo-Smith, *Statistics and Sociology*, chap. 12 (1907); Ralston, *The Delay in the Execution of Murderers*, Paper Read Before the Pennsylvania Bar Association (1911).

(2) The second is sociological study in connection with legal study in preparation for legislation. The accepted scientific method has been to study other legislation analytically. Comparative legislation has been taken to be the best foundation for wise law-making. But it is not enough to compare the laws themselves. It is much more important to study their social operation and the effects which they produce, if any, when put in action.⁹⁶

(3) The third is study of the means of making legal rules effective. This has been neglected almost entirely in the past. We have studied the making of law sedulously. It seems to have been assumed that, when made, law will enforce itself. This is true not only of legislation but also of that more important part of our law which rests in the reports. Almost the whole energy of our judicial system is employed in working out a consistent, logical, minutely precise body of precedents. The important part of our system is not the trial judge who dispenses justice to litigants but the judge of the appellate court who uses the litigation as a means of developing the law; and we judge the system by the output of written opinions and not by the actual results *inter partes* in concrete causes. But the life of the law is in its enforcement. Serious scientific study of how to make our huge annual output of legislation and judicial interpretation effective is imperative.⁹⁷

(4) A means toward the end last considered is a sociological legal history; that is, study not merely of how doctrines have evolved and developed, considered solely as jural materials, but of what social effects the doctrines of the law have produced in the past and how they have produced them.⁹⁸ Accordingly Kantorowicz

⁹⁶ Legislative reference bureaus are beginning to do this work. See Reinsch, *Bestrebungen zur Verbesserung der gesetzgeberischen Tätigkeit*, *Blätter für vergleichende Rechtswissenschaft*, viii, 246. Kantorowicz gives as an example: in preparation for housing legislation there should be inquiry as to "how far the statutory law of tenancy is silenced by contracts of leasing." *Id.* 9. See some sensible, practical remarks upon this phase of sociological jurisprudence in Tanon, *L'évolution du droit et la conscience sociale*, 3 ed., 196-202. An important recent work, largely from this standpoint, is Jethro Brown, *The Underlying Principles of Modern Legislation* (1912).

⁹⁷ See my papers, the Need of a Sociological Jurisprudence, 19 *Green Bag* 607; *Law in Books and Law in Action*, 44 *Am. L. Rev.* 12.

⁹⁸ "What method shall we employ in studying juridical phenomena? We shall have to investigate: what juridical phenomena are, their classification, the necessary and sufficient conditions in order that they be obligatory, their generality and their permanence. Comparative law can teach us already as to the comparative generality of a phenomenon. . . . Legal history makes us aware of the comparative permanence

calls for a legal history which shall not deal with rules and doctrines apart from the economic and social history of their time, as if the causes of change in the law were always to be found in the legal phenomena of the past; a legal history that shall not try to show that the law of the past can give us an answer to every question, by systematic deduction, as if it were a system without hiatus and without antinomies.⁹⁹ Instead it is to show us how the law of the past grew out of social, economic, and psychological conditions, how it accorded with or accommodated itself to them, and how far we can proceed upon that law as a basis, or in disregard of it, with well-grounded expectations of producing the results desired.¹⁰⁰

(5) Another point is the importance of reasonable and just solutions of individual causes, too often sacrificed in the immediate past to the attempt to bring about an impossible degree of certainty. A whole literature has grown up in recent years upon this subject. In general the sociological jurists stand for what has been called equitable application of law; that is, they conceive of the legal rule as a general guide to the judge, leading him toward the just result, but insist that within wide limits he should be free to deal with the individual case, so as to meet the demands of justice between the parties and accord with the general reason of ordinary men.¹⁰¹

(6) Finally, the end, toward which the foregoing points are but some of the means, is to make effort more effective in achieving the purposes of law.¹⁰²

of these phenomena. . . . One may seek to verify how far the degree of generality of a juridical phenomenon accords with its degree of permanence." Bruegilles, *Le droit et la sociologie*, 160.

⁹⁹ *Rechtswissenschaft und Sociologie*, 30-34.

¹⁰⁰ Dicey's *Law and Public Opinion in England* (1905) is a history of legislation from this standpoint. Compare Wigmore's history of the law of confessions. *Evidence*, I, § 865.

¹⁰¹ See some account of this doctrine in my paper, *The Enforcement of Law*, 20 *Green Bag* 401 (1908).

Out of the great mass of writing upon this subject in the past ten years, reference may be made to the following: Ehrlich, *Freie Rechtsfindung und freie Rechtswissenschaft* (1903); Gnæus Flavius (Kantorowicz), *Der Kampf um die Rechtswissenschaft* (1906); Fuchs, *Recht und Wahrheit in unserer heutigen Justiz* (1908); Oertmann, *Gesetzeszwang und Richterfreiheit* (1909); Gmelin, *Quousque? Beiträge zur soziologischen Rechtsfindung* (1910); Kantorowicz, *Rechtswissenschaft und Soziologie*, 11 *et seq.* (1911).

¹⁰² "The jurist must study the law teleologically; he must observe how the elements of law turn out in their respective working; whether their operation leads to useful or to harmful consequences, to consequences which accord with culture or to those which

Summarily stated, the sociological jurist pursues a comparative study of legal systems, legal doctrines, and legal institutions as social phenomena, and criticizes them with respect to their relation to social conditions and social progress. Comparing sociological jurists with jurists of the other schools, we may say:

1. They look more to the working of the law than to its abstract content.

2. They regard law as a social institution which may be improved by intelligent human effort, and hold it their duty to discover the best means of furthering and directing such effort.

3. They lay stress upon the social purposes which law subserves rather than upon sanction.

4. They urge that legal precepts are to be regarded more as guides to results which are socially just and less as inflexible molds.

5. Their philosophical views are very diverse. Beginning as positivists, recently they have adhered to some one of the groups of the social philosophical school, from which, indeed, the sociological school, on many essential points, is not easily distinguishable. While Professor Moore tells us that the time has come "in the development of the pragmatic movement for systematic and detailed applications of pragmatic conceptions and methods to specific problems, rather than further discussion of general principles,"¹⁰³ unhappily discussion of general principles goes on and a pragmatist philosophy of law is yet to come. When it is promulgated it may expect many adherents from the sociological jurists.

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oppose it; to consequences whereby values are appraised justly or unjustly." Kohler, Introduction to Rogge's *Methodologische Vorstudien zu einer Kritik des Rechts*, viii (1911).

¹⁰³ Pragmatism and its Critics, Preface.

A PROBLEM IN THE DRAFTING OF WORKMEN'S COMPENSATION ACTS.

[I.—*Concluded.*]

THE purpose of these acts being to compensate workmen for industrial accidents and not to insure workmen against want, it is evident that the employer is not bound to compensate the workman for his loss of earning power unless such loss be caused by the employment. The causal connection between the injury and the employment is the subject of two phrases in section 1 of both the English acts. A workman is entitled to compensation if "personal injury . . . arising out of his employment . . . is caused" to him. The words "is caused" are taken to relate to the connection between the accident and the harm suffered by the workman. The words "arising out of" point to the origin or cause of the accident, and are descriptive of its character or quality. They relate to the connection between the employment and the accident, the injury-producing occurrence.

Even admitting that the accident arose out of the employment, the master is only liable if the accident, and to the extent to which the accident, incapacitates the servant. All the cases in which the phrase "is caused" is considered, deal with this question. If the accident is regarded as "arising out of the employment," it is consistently held that in determining whether the physical incapacity which deprives the servant of his earning power is caused thereby to the workman, it is not relevant to say that it was not the natural or probable consequence of the accident or occurrence. The employer is bound to compensate the servant for all the results of the accident, however unexpected their extent; it is immaterial that such an accident or occurrence would not normally incapacitate the ordinary workman, or that such an accident would not, save under the most exceptional circumstances, result in any physical disability. The question whether the physical disability, the incapacity to labor, is caused by the accident, or "where death results, the question whether it results from the injury, resolves itself into an inquiry, into the chain of causation." It is

enough that the accident is one of the necessary antecedents of the disability of which the plaintiff complains. The causal connection depends upon the actual sequence of events, their relation of fact to fact as facts. The test is purely objective and external. If the compensation is to be restricted, if the employer is to be relieved from the liability for any of the injuries of which the workmen's employment is the *causa sine qua non*, the restriction, the relief, must be found in that other phrase which is also held to relate to causation — "arising out of the employment." While an injury is held to be "caused" by an accident if the accident is a *causa sine qua non*, a necessary antecedent of the injury, it is not enough that but for the employment the accident would not have occurred, that the employment is a *causa sine qua non*, a necessary antecedent, of the accident. Something more is required if the injury is to be held to be one arising out of the employment.

Now this phrase is susceptible of at least two totally different and antagonistic meanings: It may be understood to mean that the injury in fact arose from the employment, that it in fact happened because the servant was employed as he was, and that but for the employment it would not have occurred; it might even be taken to mean that it arose wholly out of the employment, that no cause connected and no force not itself originating in the employment had been a necessary factor in producing the injury. In either event such a meaning is also objective and external, it deals with facts as facts and with the actual relation of one fact with another. But, on the other hand, it is capable of being understood in a sense which has nothing to do with the actual relation of the employment to the harm, but rather to these relations considered as a subject of someone's thoughts and anticipations.

At one time there was a marked tendency to limit the liability of one guilty of tortious conduct, at least where his tort was one of negligent action or omission, to those consequences which he ought to have foreseen as likely to result therefrom.¹ The liability was made to depend upon the probability that the harm which in fact resulted would occur.² The test of legal cause was subjective, not

¹ See the recent articles by the Hon. Jeremiah Smith on Legal Cause in Actions of Tort, 25 HARV. L. REV. 103, 223, especially 114-128.

² As has been well said, "probability is not an attribute of events in themselves,

objective. This conception of legal as distinguished from actual cause, while disappearing, still occasionally crops up even in tort actions.³

While, in determining whether the workmen's incapacity is "caused" by the accident, the test is purely objective and both the master's and the sufferer's power of foreseeing it is immaterial—, the test applied to determine whether the accident arose out of the employment has become purely subjective. An accident, and so the injury resulting from it, is held to "arise out of the employment" only if it is due to a risk to which, at the time the employment begins, or a particular task is set the employee, it could be foreseen that the employment or task would probably subject him.

"It is not enough for the applicant to say the accident would not have happened if I had not been engaged in this employment or if I had not been in that particular place."⁴

The first step in this direction was taken in the Scottish case of *Falconer v. London & Glasgow Engineering Co.*,⁵ where a workman was injured by the larking of a fellow servant, in which Lord Traynor holds that the injury did not arise out of the employment "because it could not be said to be incidental to the employer's business or one of the hazards attached to it. It might equally have happened in any work." It first appears in England in *Armitage v. L. & Y. Ry. Co.*,⁶ a case whose facts were closely similar

but of our expectation of them; it is subjective not objective, it is the name for somebody's guess whether they will happen." Terry, *Leading Principles of Anglo-American Law*, § 547.

³ See 25 HARV. L. REV. 237-252, especially 251, 252.

⁴ Cozens-Hardy, M. R., in *Craske v. Wigan*, [1909] 2 K. B. 635, 638.

⁵ 3 Fraser 564 (Scot. Ct. Sess., 1901).

⁶ [1902] 2 K. B. 178, 4 W. C. C. 5. "The accident," says Collins, M. R., "did not arise from anything which by any stretch of language can be properly said to be incidental to the employment of either of the boys. It was as much outside the scope of the one to do the act which caused the injury as it was outside the scope of the employment of the other to be exposed to such an injury." And Cozens-Hardy, L. J., says: "Some meaning must be given to the words 'out of.' . . . They appear to point to accidents arising from such causes as the negligence of fellow workmen or some natural cause incident to the character of the business." In *Andrew v. Failsworth Industrial Society*, [1904] 2 K. B. 32, Collins, M. R., adopts the following language of the County Court judge: "But if there is under particular circumstances in a particular vocation something appreciably and substantially beyond the ordinary normal risk, which ordinary people run, and which is a necessary concomitant of the occupation the man is engaged in, then I am entitled to say that that extra danger to

to those in Falconer's case, and is definitely and authoritatively announced with a slight but significant variation in *Challis v. London & S. W. Ry.*⁷

"The legislature," says Collins, M. R., "in framing the Act, intended to provide for the risks of accident which are within the ordinary scope of the particular employment in which the workman is engaged. No doubt the Act does not use the expression 'risks incidental to the employment,' but the interpretation of the words 'accident arising out of and in the course of the employment' appears to me necessarily to involve the question what risks are commonly incidental to the employment."⁸

It must be remembered that the Act of 1897 was limited to certain trades and employments which may be fairly called ultra-hazardous. In *Falconer v. London & Glasgow Engineering Co.*, the first case in which it was held that no injuries arose out of the employment unless they were due to a risk incidental thereto, it is expressly pointed out by Macdonald, Lord President, that "the object of the statute was to secure compensation to workmen who are engaged in occupations which exposed them to dangers from which other occupations were free" and that it "was as against accidents incidental to the employment that the benefit of the statute was given."

"The purpose of the Acts," says Lord Trayner in the same case, "appears to have been to lay upon certain employers, the execution of whose work and business was more than ordinarily hazardous and from the nature of it more than usually attended with accidental injuries to their servants, the liability from which the employers of labor in other and less hazardous employments, were exempt, and even then only to impose the liability for incidental injuries which arose out of and in the course of the hazardous employment."

which the man is exposed is something arising out of the employment, and if in consequence of that a fatality occurs, I am entitled to say the section applies and the applicant is entitled to recover."

⁷ [1905] 2 K. B. 154, 7 W. C. C. 23. An engine driver was injured by stones thrown by boys from a bridge over the line; the boys did not intend to strike the driver, their object apparently being to throw the stones down the smoke stack.

⁸ [1905] 2 K. B. 157. Cozens-Hardy, L. J., at p. 159, uses the word "reasonably" instead of "commonly" incidental, and the one holds it to be unjustifiable, and the other thinks it would be "absurd," to leave out of sight or disregard "what is matter of common knowledge and experience," the fact "that a train in motion has great attraction for mischievous boys as an object at which to discharge missiles." Collins, M. R., at p. 157.

And he gives instances of accidents occurring to workmen while employed, which in his opinion would not arise out of it because they "are in no sense incidental to such employment and might equally happen to workmen engaged in employments which are not within the employments enumerated in the statute."

There is much to be said in favor of so construing such words in such an act. If the object is to make employers who choose to engage in ultra-hazardous businesses answer for the injury caused to their employees by the exceptional nature of their business, there seems no good reason to hold them answerable for injuries due not to those exceptional risks but to risks which would attach to any workman working in any business. On the other hand, there seems no particular justice in giving compensation to one workman because he is employed in a business which subjects him to peculiar dangers which have in fact not injured him, and to deny it to another injured in precisely the same way simply because, while his employment did subject him to the risk of the very nature from which he suffered, it did not also subject him to peculiar risks of a totally different sort, thereby becoming ultra-hazardous. If the act singles out servants in certain trades, because of the peculiar risks to which these trades subject them, as worthy of protection not granted other servants in less hazardous employments, it would seem a fair construction of the legislative intent that they were intended to be protected not from the risks which they ran as working men and to which all workmen in any employment are subject, but only from those risks which were peculiar to their exceptional employment.

In the earlier cases and even in *Challis v. L. & S. W. Ry.*, while the test is subjective, it is not subjective to either the master or the workman. The question was whether the accident arose from some danger found by experience to be so commonly attendant upon the particular employment as to be recognized as forming one of the extra hazards of it and so intended by Parliament to be covered by the act. What either the master or workman either did or could have anticipated is regarded as unimportant. The test, while subjective, is subjective to the intent of Parliament, not to the employer and employee.

The Act of 1906, however, extended the liability of the employers and the right of compensation of the workmen to all employments

irrespective of any peculiar dangers incident thereto. The object of such an act, therefore, is not to protect workmen from peculiar risks incidental to the peculiar nature of their employment, but to protect workmen as a class from an injury received in consequence of their labor, because they are regarded as incapable of bearing such loss without injury to society. A restriction of liability and of the right to compensation to those injuries which are peculiar to the nature of the particular employment on which the workman is engaged is as much out of place in such an act as it is appropriate in an act restricting liability and the right to compensation to ultra-hazardous employments.

In construing the Act of 1906, the courts have, however, consistently held that the injury to arise out of the employment "must arise out of a risk commonly incident to the employment,"⁹ or, to phrase it somewhat differently, "from a risk to which the workman was exposed by the nature of his employment."¹⁰

The test remained subjective and inevitably became subjective to the parties to the employment, the employer and the employee. Their foresight, sometimes that of the servants and sometimes that of the masters, sometimes that of both, becomes the test.¹¹ So in *Morrison v. Clyde Navigation Trustees*,¹² Lord M'Laren says:

⁹ Buckley, L. J., in *Fitzgerald v. Clarke & Son*, [1908] 2 K. B. 799.

¹⁰ Lord Kinnear in *McLauchlan v. Anderson*, 48 Scot. L. Rep. 349, 351 (1911).

¹¹ So long as there is someone else whose state of mind is important, the requirement that the risk must be commonly incidental to the employment does not necessarily indicate that the test is subjective to the parties to the contract of employment. So long as the operation of the act is restricted, as was that of 1897, to ultra-hazardous trades, what dangers were usually incidental to such an employment was important in determining whether the risk was one which was intended to be covered by the act. When, however, the act is made applicable to all employments, as is that of 1906, the workman is protected not because he is exposed to peculiar dangers different from those of other workmen in other employments, but because as workman he is unable to care adequately for the loss resulting to him from accidents which he receives in his service. It at once becomes unimportant whether the particular sort of injury or the particular cause of it could have been foreseen; the loss is there, and all that is necessary is that it should be due to his employment. If, then, in construing the act of 1906, this requirement that the injury should be from a risk incidental to the accident is regarded as an essential part of the interpretation of the phrase "arising out of the employment," it naturally follows that the intent of the legislature to include this injury because peculiarly apt to occur in a particular sort of employment being no longer important, the foresight of someone other than the public speaking through its representatives should be made the test, and it is equally natural that the foresight should be that of either or both of the parties concerned, the employee and the employer.

¹² [1909] Scot. Sess. Cas. 59, 2 B. W. C. C. 99, 102.

"It was certainly not within the contemplation of the parties when the appellant was engaged that he should get upon a moving wagon to enable him to go home to his dinner, and it was found that in doing so his object was not to serve his employer; and this is just another way of saying that the act leading to the disablement of the appellant neither arose expressly nor by implication out of his employment."

And so in *Collins v. Collins*¹³ Fitz Gibbon, L. J., says:

"I cannot understand how the occurrence could arise out of and in the course of a particular employment unless it was something the risk of which might have been contemplated by a reasonable person on entering the employment, as incidental to it."

And in *McDaid v. Steel*¹⁴ Lord Kinnear says that an errand boy who chose to work a lift which it was not his business to operate, thereby exposed himself to new risks which were not within the contract of employment which he made with his master.

Except in the dissenting opinion of Lord Atkinson in *Astley v. Evans & Co.*,¹⁵ no such explicit statement appears in any English cases, but the same idea pervades many of the recent English cases. The knowledge by the master of the existence of the conditions which bring about the accident is regarded as essential;¹⁶ and the master's knowledge can only be essential as showing that the risk of injury from this cause was within his foresight.

The cases which discuss the question as to whether a risk is so far incidental to an employment that an injury therefrom is regarded as arising out of it, fall into three groups:

1. Where the workman's injury is due to the physical conditions under which, and the surroundings amidst which, the employment is being carried on, or to the nature and condition of the working place and "its furniture," including the tools and appliances used in his employer's business.

2. Where the injury is directly due to the acts of anyone, whether the sufferer himself or a fellow workman engaged in the performance of the master's business within or without the particular sphere of labor entrusted to him.

3. Where the injury is due to some force not arising out of the

¹³ [1907] 2 I. R. 104, 108.

¹⁴ 48 Scot. L. Rep. 765, 767 (1911).

¹⁵ 4 B. W. C. C. 319, 328 (1911).

¹⁶ See for instance *Rowland v. Wright*, [1909] 1 K. B. 963, 1 B. W. C. C. 192.

employment nor due to any operation thereof, the sole connection between the employment and the force being that the workman's employment brings him into contact with it.

Even in construing the Act of 1897, restricted as it was to ultra-hazardous businesses, the conception that the injury must be one which must arise from one of those extra hazards which give the employment its dangerous character, which as has been seen is the basis of the decision in *Falconer v. London & Glasgow Engineering Co.* was never carried to its legal conclusion. In fact, its sole effect seems to have been to require that the injury should arise from a risk incidental to the employment, that is, one capable of being perceived as constituting a danger to those engaged therein. This appears with peculiar distinctness in those cases which deal with the liability of the master for injuries caused by the condition of his premises, or its "necessary furniture,"¹⁷ or any other conditions which to his knowledge exist thereon.¹⁸ In *Blovelt v. Sawyer*,¹⁹ a servant employed in a factory was injured while at his dinner by the fall of a wall, part of his employer's premises. He came within the act because he was employed in a factory which, as defined in the Factory and Workmen's Shops Acts, includes only occupations in which machinery, steam, water, or other mechanical power is used. The wall which fell might have fallen upon him at any work, in any premises; the wall fell because it was a bad wall, not because it was a factory wall. Indeed, it seems to be universally accepted that the risk need not be one which is peculiar only to the class of employment enumerated in the act. Nor under the Act of 1906 need it be one to which workmen and servants in other employments or even the public generally are not exposed.²⁰ The physical conditions sur-

¹⁷ In *Rowland v. Wright*, *supra*, Cozens-Hardy, M. R., says that "part of what may be called the necessary furniture of a stable is the stable cat." He goes on to express that nothing he has said "will lend itself to the conclusion that if the man had been walking along the street and the cat had bitten him the master would have been liable."

¹⁸ In *Rowland v. Wright*, *supra*, Cozens-Hardy, M. R., distinguishes sharply between a stable cat which both the employer and servant knew was in the stable and "a strange cat."

¹⁹ [1904] 1 K. B. 271, 6 W. C. C. 16.

²⁰ In *Rowland v. Wright*, *ante*, n. 16, the court says that the right of a stableman bitten by a stable cat "is the same as if the man had been an ordinary domestic servant whose duties took him into the presence of a cat." Indeed, it would seem that the risk of being bitten by domestic animals, such as cats and dogs, is not one to which servants as such are any more exposed than their masters and their families. The

rounding the servant while at work are consistently regarded as a part of the individuality of the employments there carried on; danger of this sort is always regarded as a risk incidental to the employment. So, too, it was not necessary that the injury caused by the operations of a business, whether conducted by the sufferer himself or by his fellow servant, should be of a sort not likely to occur in any but this sort of employment. Even under the Act of 1897 it was not necessary that it should result from any of those operations which, being peculiarly dangerous, have led to the employment being enumerated in the act. It is enough that the work which is being done and which is the cause of the injury should be done in the course and within the scope of the employment of him who is doing it whether by the sufferer or his fellow workmen.

If the injury is the direct result of something done by the sufferer in the course of his employment,²¹ or "from the negligence of a fellow workman in the course of his employment,"²² it is consistently held to be within the act.

While the test is subjective, the master's knowledge being essential, he need have no actual reason to regard the servant's injury as reasonably probable. It is enough that the employer knows that there exists in the business the situation which gives rise to the accident. It is enough that he knows that there is a wall upon his premises, or that a cat is allowed to stay there, or that certain work is being done; it is not necessary that he should know the precise condition which exists; for instance, that he should know that the wall is in bad repair, or that the cat is vicious and fierce, or that the servant is careless and apt to be guilty of negligence. Nor is it necessary that he should be guilty of negligence in any way, that he should have been derelict in not having ascertained the condition of his premises and in not having repaired it, or that he should know the nature of his cat or servant. Nor, if he knows of the actual condition of affairs, is it necessary that it contain a threat of injury so great that the master should appre-

risk is common, if not to all humanity, at least to that very large part of it who live in houses where pets are kept.

²¹ An injury arises out of the employment, says Cozens-Hardy, M. R., in *Craske v. Wigan*, [1909] 2 K. B. 635, 638, if the applicant can say, "The accident arose out of something I was doing in the course of my employment."

²² *Mathew, L. J.*, in *Armitage v. L. & Y. Ry.*, [1902] 2 K. B. 179, 183.

ciate its occurrence as probable; it is enough that he knows of the existence of the situation,²³ — a situation which, since it exists upon his premises and in his business, is regarded as so far individual to it that the risk of injury from it is incidental to that business and to the employment of all those who work therein.

As has been seen, an injury caused to a servant by his own deliberate departure from his designated sphere and place of work, or by his adoption for his own purposes of a dangerous method of work, is held not to arise out of the employment but from new risks which he himself has added to it.

And from the first it has been held that the injuries sustained by a servant while himself engaged upon the actual work entrusted to him does not arise out of the employment if it be due to the acts of fellow servants who themselves are outside the course of employment and are acting for their own purposes and not in an honest though mistaken or excessive effort to further their master's interests. Not only must the injured servant be in the course of his employment, but the acts of the fellow servants must be done in the course of their employment and arise out of it in the sense that they must be done for the purpose of furthering the performance of the work entrusted to them. Acts causing injury by a fellow servant, done through sheer spite or malice,²⁴ or in a spirit of fun, or in the act of "larking," are held not to arise out of the employment.²⁵

The cases do not clearly determine whether the risk of conduct on the part of a fellow servant, which, if that of the sufferer himself, would clearly put him outside the course of his employment and prevent his injury from arising thereout, is or is not *ipso facto* outside of the risks incidental to employment of those at work near him. All the cases have been cases of larking or other cases in

²³ "Neither the master nor the man expected the cat to bite, but his [the man's] duties took him into the place where the cat was." *Rowland v. Wright*, *ante*, n. 16.

²⁴ If the fellow servant's action is designed to further the work entrusted to him and is appropriate thereto, the fact that it is excessive and that there is bad blood between him and the sufferer does not defeat recovery. *McIntyre v. Rodgers*, 6 Fraser 176 (Scot. Ct. Sess., 1904).

²⁵ *Falconer v. London & Glasgow Engineering Co.*, 3 Fraser 564 (Scot. Ct. Sess., 1901); *Armitage v. L. & Y. Ry.*, [1902] 2 K. B. 278, 4 W. C. C. 5; *Fitzgerald v. Clarke & Sons*, [1908] 2 K. B. 799; *Baird v. Burley*, [1908] Scot. Sess. Cas. 545, 1 B. W. C. C. 7; *Wilson v. Laing*, 46 Scot. L. Rep. 843, 2 B. W. C. C. 118 (Ct. Sess., 1909) (servant struck in the eye by a ball thrown in play by a fellow domestic).

which the fellow servant's act was directed against the sufferer, though perhaps not with any intention of injuring him. No case has held that the risk of injury, from a fellow servant temporarily "quitting his employment" ²⁶ by doing for the moment something solely for his own convenience or pleasure, thereby increasing the risk to his fellows as well as to himself, is or is not a risk incidental to the employment of a fellow workman injured thereby. Yet such situations are apt to occur at any time. The instance given by Lord Moncreiff, dissenting in Falconer's case, of a miner deliberately opening his safety lamp for the purpose of lighting his pipe, would fulfil all the conditions necessary to bar such miner if himself injured. No case deals with this or any similar situation, nor does any case decide whether the risk of injury from a workman's choice for his own purposes of an unnecessarily dangerous way of doing his appointed work, which would undoubtedly bar him from compensation if injured, is or is not a risk incidental to the employment of his fellow workmen. The cases do not carry the master's exemption much, if any, further than the statement of Cozens-Hardy, L. J., in the first English case of this sort,²⁷ to the effect that "an accident caused by the tortious act of a fellow workman having no relation whatever to his employment, cannot be said to arise out of the employment."

On the other hand, it is held that the risk of injury by the tortious acts of third parties, strangers to the business, is a risk incidental to the employment if experience has shown that its nature,²⁸ or the nature of the service required by the employee on some particular occasion,²⁹ is such that it is reasonably probable that the servant will be exposed to such tortious interference. But the servant's exposure must be reasonably probable, it is not enough

²⁶ See Loreburn, L. C., in *Reed v. G. W. Ry.*, *ante*, 25 HARV. L. REV. 420, n. 55.

²⁷ *Armitage v. L. & Y. Ry.*, [1902] 2 K. B. 178, 4 W. C. C. 5, *ante*, n. 6.

²⁸ In *Anderson v. Balfour*, 44 Ir. L. T. 168, 3 B. W. C. C. 588 (C. A. Ir., 1910), the risk of injury from assault by poachers was held to be incidental to the complainant's employment as a gamekeeper. In *Challis v. L. & S. W. Ry.*, [1905] 2 K. B. 154, 7 W. C. C. 23, it was held that the risk of injury by stones thrown by mischievous boys at an engineer was, in view of the known tendency of boys to throw stones at engines, a risk incidental to the employment of an engine driver.

²⁹ In *Nesbit v. Rayne & Burn*, [1910] 2 K. B. 689, 3 W. C. C. 507, it was held that the risk of being robbed and murdered was incidental to the employment of the servant who was sent by rail with a large sum of money, for the payment of wages of miners, though his general employment was the usually safe one of clerk.

that he may possibly be subjected to such danger.³⁰ The first case,³¹ which arose under the Act of 1897, was one in which the tortious act was directed against the property of the employer and incidentally injured the employee who was in charge of it. The later cases,³² decided under the Act of 1906, allowed compensation for injuries by tortious acts directed against the servant himself and intended to injure him as an employee, and because of the employment and not because of any animosity personal to him as an individual.³³

³⁰ In *Murphy v. Berwick*, 43 Ir. L. T. 126, 2 B. W. C. C. 103 (C. A., 1909), it was held that an injury received by a hotel cook in the kitchen during a struggle with a drunken guest who was trying to kiss her, did not result from a risk incidental to her employment. (Though it was suggested that it might be a risk incidental to the employment of a barmaid.) "No case," says Walker, L. C., "has been cited in which an employer has been held liable for the tortious acts of third parties, where such tortious act was not a risk reasonably to be contemplated by the employee in undertaking the employment." Similar language is used in *Collins v. Collins*, [1907] 2 I. R. 104, in which it was held that the risk of being wounded in an affray in which the servant engaged for the protection of his master was not incidental to his employment of sewage work. It would, however, seem that since it is not necessary that the risk should be incidental to the general employment, if it is one to which the particular service on which the employee is engaged tends reasonably to subject him, this case therefore can only be supported on the ground that the servant was not justified in leaving the general field of his labor and undertaking the protection of his master's person. (See *ante*, 25 HARV. L. REV. 413, n. 43.) It would seem that if the master asked or permitted the claimant to interfere in his behalf — the matter left in doubt by the facts reported — or if the master's peril constituted an emergency which justified the servant in departing from his usual sphere of employment and going to his master's aid, while the risk was not within his contemplation when he entered upon his general employment, it was one to which his particular service obviously tended to expose him.

³¹ *Challis v. L. & S. W. Ry.*, [1905] 2 K. B. 154, 7 W. C. C. 23.

³² *Nesbit v. Rayne & Burn*, [1910] 2 K. B. 689, 3 W. C. C. 507; *Anderson v. Balfour*, 44 Ir. L. T. 168, 3 B. W. C. C. 588 (C. A. Ir., 1910).

³³ In *Murray v. Denholm & Co.*, 48 Scot. L. Rep. 896 (Ct. Sess., 1911), in which a workman, who remained loyal to his master and continued at work during a strike, was wounded by a mob of strikers who entered the shop for the purpose of closing it, recovery was denied, but principally upon the ground, in which all of the judges concurred, that the injury being intended could not be regarded as an accident. Of the judges, however, discussing the question as to whether, had it been an accident, it has arisen out of the employment, two of the three held that it would not have arisen out of the employment, the third expresses his doubts upon the subject. It would seem that under the English cases, of which the Scottish judges expressed their disapproval, recovery should have been allowed. Experience shows that workmen continuing work during a strike are peculiarly exposed to the risk of violence at the hands of the strikers; to hold the master liable in such case would not make him liable for any assault made upon the workman on his way home or when he had arrived there, because in such case, his employment having terminated when he left the master's

Much is to be said for an interpretation of the Act of 1897, restricted as it is to ultra-hazardous employments, which would deny compensation for injuries received from the tortious acts of both fellow workmen and strangers. But even in such an act there seems no good reason for distinguishing between these two sorts of tortious acts, unless an employment is classified as ultra-hazardous because of its tendency to provoke tortious violence against those employed therein. The employment of policemen might well be so regarded, because those employed therein are well known to be subject to assaults upon them, not as men but as policemen. But no one of the employments enumerated in the Act of 1897 is included therein because of such special peril.

In construing the Act of 1906, which is applicable to all businesses though not peculiarly dangerous, there seems no reason for making the deliberate wrongfulness as distinguished from the mere negligence of a fellow servant's acts or the object for which it is done, whether in furtherance of the master's business or for the servant's own amusement, of itself the decisive factor. Still less does it seem proper to distinguish between the tortious acts of fellow servants and of strangers. Under such an act the rule that injuries to arise out of the employment must result from risks incidental to it ceases to have relation to the peculiar perils of the employment, which, by rendering it peculiarly dangerous, leads to its inclusion in the act. What risks are incidental depends upon the foresight of the parties at the time the general employment began or the particular work is assigned the employee. The test should be, therefore, whether the acts which cause the injury are of the sort which experience should have led the parties to have actually foreseen, and should not be made to depend upon the object or character of the act, or of the status or position of the person guilty of it, except in so far as its object, or character, or the position of the person doing it, tends in fact to make its occurrence probable or improbable.

If the foresight of the parties is the proper test, it seems certain that no hard and fast distinction should be drawn between the tortious acts of third parties and of a fellow workman.³⁴ While

premises, his injury while it might arise out of his employment would not be received in the course of it.

³⁴ In *Murray v. Denholm & Co.*, *supra*, Lord Salvesen says that if the workman cannot recover compensation from his employer for injury deliberately inflicted by his

many employments do from their nature tend to subject the servant to risk of violence from outsiders, yet in many instances the conditions of the employment, the known character of the working forces, are such that nothing is better known than that those employed therein will be subject to grave dangers by the horse play and deliberate misconduct of their fellow servants, and by their deliberate choice of methods and places of work, for their own convenience and in disobedience of orders, which threatens serious injury not only to themselves but to their fellows. One of the most usual forms of serious and wilful misconduct which under both acts is a total or a partial bar to compensation is this very thing; it would seem that so prevalent and frequent a practice could hardly be regarded as so abnormal as to be outside the contemplation of the parties as a thing likely to increase the risks of the employment.

The most difficult questions arise where a workman's injury is due to a cause not itself connected with the employer's business nor created by it, but which is one outside the business, into contact with which he is brought in the course of his employment. The cases are in hopeless confusion. It seems impossible to deduce from them any general principle or definite test by which it can be determined whether the risk from such a source is to be regarded as incidental to the employment, and so whether an injury due to it is to be held to arise out of the employment. One of the tests most usually given is whether it is one of "the ordinary dangers to which the nature of the workman's employment exposed him,"³⁵ "a risk to which the workman is exposed by the nature of the employment."³⁶ Yet, under the authorities, this appears to be too broad. It is constantly said that "there must be something appreciably and substantially beyond the ordinary and normal risk which people ordinarily run and which is a necessary concomitant of the occupation the man is engaged in."³⁷

fellow workmen, still more is this so where he "is injured by a third party over whom the employer has no control and who has entered his premises without his consent." At p. 905.

³⁵ The Lord President (Dunedin) in *McNeice v. Singer Co.*, [1910-1911] Scot. Sess. Cas. 12, 48 Scot. L. Rep. 15, 4 B. W. C. C. 351, and in *M'Laren v. Caledonian Ry.*, 48 Scot. L. Rep. 885, 887 (Ct. Sess., 1911).

³⁶ Lord Kinnear in *M'Lauchlan v. Anderson*, [1911] Scot. Sess. Cas. 529, 48 Scot. L. Rep. 349, 351, 4 B. W. C. C. 376, 378.

³⁷ Collins, M. R., in *Andrew v. Failsworth Industrial Society, Ltd.*, [1904] 2 K. B. 32, 35, quoting the County Court judge.

If the risk is one common to all humanity, it is not enough that his employment subjects him, in common with all humanity, to it. Such a risk is incidental to his existence as a human being, not to his employment. Yet it is impossible to distinguish broadly between dangers of a sort to which only workmen in a particular employment are subjected and dangers of the sort to which all men are exposed. In *Pierce v. The Provident Clothing Co.*,³⁸ Buckley, L. J., does draw this distinction: "An accident," he says, "arises out of the employment when it results from a risk incidental to the employment as distinguished from a risk common to all mankind." But in the next sentence he shows that even to him the nature of the danger affords no definite test, for he adds: "though the risk incidental to the employment may include a risk common to all mankind." It is not enough to bar recovery that the danger is one to which all are subject. The risk must be the same; if the workman's employment involves a greater exposure to the danger than that to which the ordinary person is subject,³⁹ the risk of such greater exposure may be one incidental to his business. It may be said that the cases exhibit the thought that the employment must peculiarly tend to subject one employed therein to the risk of injury from a danger common to all mankind. The employee must be "exposed by the nature of his employment to some peculiar danger."⁴⁰ But it still remains to define the peculiarity. The word necessarily involves a comparison. It remains to be seen with what persons or class of persons the comparison is to be made. It involves also the

³⁸ [1911] 1 K. B. 997, 1003.

³⁹ Collins, M. R., in *Andrew v. Failsforth Industrial Society, Ltd.*, *supra*, says the question is, "was the man exposed to more than the normal risk, which everybody, so to speak, incurs at any time and in any place."

⁴⁰ Cozens-Hardy, M. R., in *Craske v. Wigan*, [1909] 2 K. B. 635, 637, 2 B. W. C. C. 35, 39, in which it was held that an injury to a lady's maid, due to her striking herself in the eye in the effort to ward off a cockchafer which flew through an open window into the room where she was working, did not arise out of the employment. "The risk was in no way incidental to the employment of a lady's maid. She was not placed by reason of the employment in a position of any special danger. The incursion of a cockchafer through an open window into a room where there is a light is a risk common to all humanity." The peculiarity need not be in the nature of the work itself, it may lie in the condition under which it is carried on. So in *Chitty v. Nelson*, 126 L. T. J. 172, 2 B. W. C. C. 496 (Stockton in Tees Co. Ct., 1908), it was held that the suffocation of a domestic servant in her room in a fire arose out of her employment, since the situation of her room and the lameness of the cook, her room-mate, rendered her escape peculiarly difficult.

idea that the risk must differ in extent or the degree of the exposure to the common danger; it remains to be seen in what this difference must consist, and whether it is possible to formulate any principles as to the character or the nature of the difference so as to afford a practical working guide to the determination of the existence or non-existence of liability.

Even a casual examination of the cases will show that it is impossible to formulate any definite test as to the amount of extra exposure, of peculiarly intimate contact, needed to make the risk one peculiar to the employment, or to determine with what greater frequency the risk must be encountered. In each case it appears to come down to what can hardly be called the opinion of the individual judge, for judicial opinion is primarily the result of reasoning based upon approximately definite principles.⁴¹ It is rather the sentiment of the trial judge which controls, unless the sentiment of the majority of the appellate court conflicts with it. It seems impossible to find any real reason for the action of the courts in cases of this class. For example, it was held that a workman upon a scaffold ten feet high was peculiarly exposed to lightning,⁴² but that a man forced by the urgency of his employer's need to remain against his protest at his work of road-mending in a violent storm, during which every one who could had sought shelter, was not exposed to any greater risk from lightning than anyone else within the area of the storm.⁴³ Yet it was as much the nature of the latter's employment which forced him to remain out of doors in the storm as it was the nature of the former's employment which took him upon the scaffold; and while a workman who is at work at an elevation is perhaps a slightly

⁴¹ Lord Kyllachy says in *Haley v. United Collieries, Ltd.*, [1907] Scot. Sess. Cas. 214, 44 Scot. L. Rep. 193, 195: "The question . . . whether the accident arose out of and occurred in the course of the employment . . . cannot be solved by reference to any formula or general principle, but must always depend upon the circumstances of each case." And see the protest of Lord Loreburn, L. C., in the course of argument in *Kitchenham v. S. S. Johannesburg*, [1911] A. C. 417, and *Walters v. Staveley Coal & Iron Co., Ltd.*, 4 B. W. C. C. 303, 304 (1911), against the citation of prior decisions upon any but precisely identical facts.

⁴² In *Andrew v. Failsworth Industrial Society, Ltd.*, [1904] 2 K. B. 32.

⁴³ *Kelly v. Kerry County Council*, 42 Ir. L. T. 23, 1 B. W. C. C. 194 (C. A., Ir., 1908). *Fletcher Moulton, L. J.*, dissenting in *Warner v. Couchman*, [1911] 1 K. B. 351, says, at p. 358: "This was a sound view by reason of the fact that lightning is indiscriminate in its action, and persons at home or abroad, at work or unemployed, run substantially equal dangers." One may be permitted to differ as to the equal probability of being struck by lightning while indoors and out.

better target for lightning than one working on the ground, it seems equally clear that a man runs a greater danger of being struck while out in the open than he does if under shelter. So, too, while it was held that the risk of sunstroke was incidental to the employment of one painting a ship in dry dock in the tropics,⁴⁴ it was held that the risk of having his hands frost-bitten was not incidental to the work of a sailor, required as such to pull upon frozen and icy ropes, because in Halifax, where the injury occurred, everyone who goes out in winter runs some risk of injury by the cold.⁴⁵ Yet while in the one case the danger of sunstroke is increased by the glare of the sun from the ship which was being painted, and so the painter was exposed to a greater risk than other residents in the tropics, it would seem equally certain that the danger which every resident of Halifax runs of having his hands frost-bitten was in the sailor's case greatly increased by the necessity of handling icy ropes.

Nor is the requirement that if the risk is not greater in degree the exposure to it must be more frequent, consistently applied. In *Pierce v. The Provident Clothing Co.*,⁴⁶ an employee, whose employment as a canvasser for subscriptions took him constantly about the streets of London, chose with his employer's knowledge to use a bicycle as a means of getting about; while riding his bicycle he collided with a tram car and was killed. It was held that the risk of injury from the traffic of the streets was one incidental to his employment. Yet not three months before the same court had held in *Warner v. Couchman*⁴⁷ that the risk of having his hands frost-bitten was not incidental to the employment of a baker's boy whose duty it was to deliver bread for his master and to collect payment therefor, because "there was nothing in the nature of his employment which exposed him to more than the ordinary risk of cold to which any person working in the open air was exposed on that day";⁴⁸ "the squire in his dog cart, the farmer in his gig, the butcher, the grocer traveling, the carters in their carts, were all in

⁴⁴ *Morgan v. S. S. Zenaida*, 25 T. L. R. 446, 2 B. W. C. C. 19 (C. A., 1909). See accord the very recent case of *Davies v. Gillespie* (C. A., Oct. 17, 1911), briefly reported in 105 L. T. 494.

⁴⁵ *Karemaker v. S. S. "Corsican"*, 4 B. W. C. C. 295 (C. A., 1911).

⁴⁶ [1911] 1 K. B. 997, 4 B. W. C. C. 242.

⁴⁷ [1911] 1 K. B. 351, 4 B. W. C. C. 32.

⁴⁸ *Cozens-Hardy, M. R.*, in *Warner v. Couchman*, [1911] 1 K. B. 351, 354.

just the same position of exposure.”⁴⁹ No importance was attached to the fact that he had to take off his gloves in order to make change. “This,” it was said, “though probably more convenient, was not necessary.”⁵⁰ Yet in *Pierce v. The Provident Clothing Co.* the deceased’s use of the bicycle, while no doubt convenient, was even less necessary for the proper discharge of his duties.

It is impossible to reconcile *Warner v. Couchman* with *Pierce v. The Provident Clothing Co.* on any other supposition than that of a purely arbitrary distinction drawn between the risks of dangers due to natural causes and the risk of the known dangers of civilized life. If *Warner* was not by reason of his employment as baker’s boy exposed to the cold to any greater degree than any other person whose business or pleasure forced him abroad in the cold, neither was *Pierce* subjected in any greater degree to the perils of travel on the streets than was anyone of the multitude of people who were on that day riding bicycles for their business or their pleasure in the streets of London. Nor was the number of persons whose business or pleasure took them out into the cold on the day upon which *Warner* was injured any greater than, if as great as, the number of persons who were abroad in the streets of London on the day upon which *Pierce* was injured; nor was the frequency or duration of the exposure greater in the one case than the other.

Whether peculiar frequency of exposure is necessary to make the risk incidental to the employment is more than uncertain. In *McNeice v. Singer Sewing Machine Co.*⁵¹ the Lord President (Dunedin), upon whose opinion *Cozens-Hardy, M. R.*, largely rests his decision in *Pierce’s* case, laid no stress whatever upon the fact that the complainant’s employment, as salesman and collector, required him to be constantly in the street. “That many members of the public are exposed to the same danger” to him is not “the criterion.” To him it was enough that the claimant “in the course of his employment is compelled to go into the streets,” and so was exposed to the risk, not as a member of the public but because his employment required him on that particular occasion to subject himself to it. It is true that *Cozens-Hardy, M. R.*, in *Pierce’s* case alludes to the frequency with which the decedent by the

⁴⁹ *Farwell, L. J.*, at p. 359.

⁵⁰ *Cozens-Hardy, M. R.*, at p. 354.

⁵¹ [1910-1911] *Scot. Sess. Cas.* 12, 48 *Scot. L. Rep.* 15, 4 *B. W. C. C.* 351.

nature of his employment was forced to encounter the perils of traffic;⁵² and Buckley, L. J., intimates the same idea by his comparison of the risks of collision to which a railway guard and an ordinary traveler by rail are subject.⁵³ Yet Cozens-Hardy, M. R., himself gives as an instance of an accident, undoubtedly arising out of and in the course of the employment, the running down by a tram car of a house servant sent upon an errand; yet no one could suppose that the position of a house servant tended to expose him with any peculiar frequency to the risk of traffic in the public streets. In fact, if such accident arises out of the employment at all, it is because it occurs from a risk to which the particular service required does, on that particular occasion, in fact expose him in common with all persons who have occasion to be upon the street.⁵⁴

In fact, in Warner's case the Court of Appeal compared the claimant's employment with that of other persons, and denied him recovery because the risks which he ran were not peculiar to his employment and to no other, or to only a few others, while in Pierce's case they, like the Court of Sessions in McNeice's case, properly refused to make such a comparison. It seems clearly erroneous to compare the claimant's employment with other employments.⁵⁵ "The law does not say 'arising out of his employment

⁵² He says, at p. 999, that the deceased's "work" (as a canvasser) "necessarily involved spending a great part of the day in the streets in this triangular area; and in the course of his duties he was beyond all doubt much more exposed to the risks of the streets than ordinary members of the public."

⁵³ At p. 1003. He draws the same comparison in *Fitzgerald v. Clarke & Son*, [1908] 2 K. B. 796, 800.

⁵⁴ Indeed Cozens-Hardy is contrasting the liability of a master whose house servant is injured by street traffic while on an errand with the non-liability of a master whose servant is similarly injured at the same spot on his night off on his way to amuse himself at "The Franco-British Exhibition." Yet surely the object of his journey does not in the least increase his risk; the sole distinguishing factor is that in the first case the particular service required of him compels him to face it.

⁵⁵ In the very recent case of *Amy's v. Barton*, 105 L. T. 619 (C. A., Oct. 25, 1911), an engineer employed to run some machinery upon a farm died of blood poisoning caused by a slight wound in his leg. The only evidence as to its cause was what the deceased had himself said — that he had been stung by a wasp of which many had been seen about. This evidence was rejected, but the court held that even had it been admitted, his dependents could not have recovered compensation, because, as Cozens-Hardy, M. R., said, "His particular employment did not expose him to any peculiar risk, or any greater risk than anybody who was engaged in the most ordinary occupations on a farm or elsewhere in the country was exposed to." If he thereby meant

and out of that employment alone.' Other employments have nothing to do with the question."⁵⁶

Even in an act confined to ultra-hazardous trades such a comparison would be inappropriate. Under such an act it might be proper to require that the risk should be one of those which give to the business its extra-hazardous character, but even so it would only be proper to compare the employment with other employments not enumerated in the act and to exclude all risks not peculiar to the businesses covered by the act. Still less is it appropriate in an act applicable to all employments. Were the act designed to protect work-people because as such they are exposed to peculiar perils, it might be proper to compare the risk with that run by persons having no business to do. Yet no such comparison is attempted in any case. Indeed, it would seem that the whole conception that the risk must be in any way peculiar to the particular business is utterly out of place in such an act as that of 1906. The workman is singled out for protection not because peculiarly apt to be injured, but because as a class workmen are regarded as peculiarly unable to take care of the loss resulting from injury without serious detriment to

to compare the particular employment of the engineer with other sorts of farm labor or with employments on other farms, and intended to intimate that the risk must be peculiar to the particular sort of farm labor entrusted to him and not one common to all sorts of labor upon that or other farms, or that it must be peculiar to the employment on that particular farm as distinguished from the risk commonly attached to farm work wherever done, he goes far beyond anything as yet decided. Probably he meant no more than that the risk must be one peculiar to farm labor and not common to all persons employed in the most ordinary occupations of any sort in the country, in which event the case goes no further than *Warner v. Couchman* or *Craske v. Wigan*, itself a case of injury by a common insect. The fact that the wasps were found upon the master's premises is not decisive, nor is his liability made to depend, as indicated in a brief report of the same case in 56 Sol. J. 27, upon the domicile of the wasp, upon whether it was a wasp resident or wasp errant. The distinction between this case and *Rowland v. Wright* is that the wasps were not brought upon the premises by the master nor maintained there to his knowledge as part of "the necessary furniture" of the farm, as was the stable cat in *Rowland's* case, but, on the contrary, were natural incidents of country life. It is intimated that if it had been shown that the engineer's death was due to a sting of a hibernating wasp which the noise of the engine had roused, the risk would have been peculiarly incidental to such farm work as his, and would differ from that of other farm laborers and country residents who during the hibernating season run little or no risk of wasp stings.

⁵⁶ Fletcher Moulton, L. J., dissenting in *Warner v. Couchman*, [1911] 1 K. B. 357. It is carefully pointed out by him in *Pierce v. Provident Clothing & Supply Co., Ltd.*, that his dissent was not upon the principles laid down in *Warner's* case, but upon their application to the facts.

society, present and future. This incapacity is present whenever he is injured; it should be enough that in fact his employment has brought the injury upon him.

II.

Having examined the decisions of the British courts which have construed and applied the phrase "arising out of and in the course of employment," it remains to consider whether the results reached are such as to make it desirable to copy these words in whole or in part, verbatim or with modifications, into American legislation upon this subject.

As has been seen, there seems to be a substantial agreement that such acts should be so drawn as, in so far as it is possible, to prevent rather than to encourage litigation, and so to save the waste attendant thereon. In order that litigation shall be prevented, it is necessary that upon the happening of any given accident it should be as nearly as possible certain whether the victim is or is not entitled to compensation. In order to arrive at this certainty, two things are required: First, that the act can be so construed as to supply definite rules and principles by which a given state of facts, when proved to exist, can be determined to fall within or outside its operations. Such principles must be capable of being formulated in advance so that they may furnish an existing standard by which the rights of the parties under the act can be ascertained. Secondly, such rules and principles should regard as decisive only such facts as are capable of definite and certain proof by witnesses. Every act must be applied to the facts of each particular case; it is impossible to draw any act so as to be automatically applicable. Some facts must always be proved, and conflict of evidence is possible in the proof of even the simplest facts. But if even approximate certainty is to be attained, the act should be as far as possible so framed as to make decisive only those external and physical facts which are capable of actual perception by witnesses, and as to which, therefore, dispute can only arise from flat perjury or from an honest difference in the perception of the facts by different witnesses. Every effort should be made to exclude as decisive of the right of compensation those so-called issues of fact which are in reality matters of inference from physical facts proven to exist. Unless the situation is very simple,

so that the inference to be drawn therefrom is obvious or is so usual that a particular inference has come to be regarded as the legally proper one to draw, there is always room for great uncertainty. It is hardly right to call these "questions of fact"; they are rather matters of opinion as to the effect of facts and in their nature are subject to the uncertainties inherent in all matters of opinion; they can only be finally determined by the decision of whatever body it may be whose province it is to draw the final inferences.

As has been seen, such general principles as have been formulated for the application of the phrase "arising out of and in the course of the employment" are at best vague and indefinite save where they are purely arbitrary. Indeed, after years of litigation, there is even grave doubt as to whether any general principles do exist. In *Haley v. United Collieries*,⁵⁷ Lord Killachy says that the question as to whether the accident arises out of and occurs in the course of employment "cannot be solved by reference to any formula or general principle, but must always depend upon the circumstances of each case," and Lord Loreburn, in several recent cases,⁵⁸ has protested against the citation of any case as authority unless decided upon facts practically identical with those in hand. If the phrase requires definition as well as application in each case arising under circumstances not previously litigated, it is indeed difficult to see how litigation is prevented rather than encouraged by its use. Neither the master nor the servant can know whether he is entitled to compensation or liable therefor until the opinion of the highest court is had upon the case.

It would seem, however, that these eminent judges are rather pessimistic. Certain general principles seem to have been evolved, or at least to be in the process of evolution, many of them vague and indefinite, some of them arbitrary, and most of them depending not upon the proof of external facts but upon some inference to be drawn therefrom, generally an inference as to the state of mind of one or the other of the parties. For instance, it is finally established that the workman's employment begins when he enters upon the premises upon which the employer conducts his business, and terminates when he leaves it.⁵⁹ This, while perhaps arbitrary, has

⁵⁷ *Haley v. United Collieries, Ltd.*, [1906-1907] Scot. Sess. Cas. 214, 216.

⁵⁸ See note 41, *ante*.

⁵⁹ It is agreed that the right to compensation under workmen's compensation acts

the merit of certainty both in the definiteness of the principle announced and in that the only fact necessary to be proved is the purely physical and external one of the place of injury; but the certainty extends only to the exclusion of the employee from the benefit of the act by the fact that the injury occurred outside the premises. His right to recover for injuries received upon the premises is made to depend upon the reasonableness of his presence at the place of injury or upon the propriety of his choice of a particular path to or from his actual place of work, or of a place for doing things ancillary to his employment, and therefore depends upon the opinion of the judge upon an issue, the determination of which cannot with any confidence be predicted, in which the slightest difference in the facts may lead to entirely different conclusions. So, too, the right of a servant to recover for injuries received while doing work of a sort not specifically entrusted to him depends upon questions solely of opinion. For one thing, upon whether the nature of his employment is one which permits him a reasonable range of deviation from the field of his appointed labor. This question, except in an extreme case, is evidently one in regard to which reasonable persons may reasonably differ. Then, again, the extent of the deviation may well be decisive; this is a mere question of degree which admits of an infinite variety of opinion as to the precise point at which the task which the workman assumes becomes generically different to that set him. But even this does not exhaust the list of doubtful questions upon which his right may depend. He is permitted an almost unlimited deviation if the preservation of his master's property requires it, and whether such an emergency has arisen requiring such action is evidently a matter of opinion. Nor is this all. The existence of the emergency as a fact is not required; it is enough that the servant honestly believes that an emergency exists, thus introducing the most doubtful of all issues, the mental state of the sufferer.

should be an employee's exclusive remedy against his employer. As most if not all American jurisdictions hold that a servant is subject to the defenses of fellow service and assumption of risk, while upon his employer's premises, on his way to or from rest or while eating, resting, or otherwise satisfying the wants of nature though not actually engaged upon his appointed task, it seems advisable to provide expressly, in accordance with the construction put by British courts upon the words "in the course of employment," that a servant injured under such circumstances shall be entitled to compensation, at least if his injury results from the condition of the premises or is caused by the operation of the business conducted thereon.

All of these questions arise in determining whether a servant is in the course of his employment. And yet the construction put upon the phrase "arising out of the employment" is even more vague and indefinite, and the issues raised under such principles as have been formulated are even less susceptible of accurate proof, but are even more exclusively matters of opinion. The principal test is that most uncertain issue, the foresight of the parties at the time the employment begins. The subsidiary principles by which this test is to be applied are in many instances still a matter of dispute: for instance, it is hard to say whether there is any rule differentiating risks common to all mankind and risks peculiar to a particular sort of employment; and if there is any such distinction, it is even more doubtful whether there is or is not a purely arbitrary line drawn among risks general to all mankind between the risk of injury from purely natural forces and from dangers created by the activities of civilized mankind. Even where certainty of definition has been attained, the object or purpose of either the sufferer or the person who injures him, in doing what he does, is in very many instances made a decisive factor.⁶⁰ It seems, therefore, that it can be confidently said that, as construed by the English courts, the phrase is not one which tends to obtain either of the prime requirements of certainty of operation, the formulation of definite principles by which new states of fact can be seen to fall within or without the act, or the elimination of those so-called issues of fact, the result of which, depending as they do upon the inferences to be drawn from physical facts, can never be predicted with certainty.

There is likewise a substantial agreement that the employee's right to compensation and the employer's liability therefor, should not be dependent upon the moral or social guilt or innocence, the care or negligence, of either of them. The purpose is not to punish wrongdoing or to reward merit, but to relieve a social condition found

⁶⁰ For example, it has been seen that a servant injured by adopting for his own purposes a particular means of doing his work not expressly authorized by his employer, cannot recover if he has adopted it for the purpose of furthering some private purpose of his own. Yet there is great confusion as to what constitutes a private purpose; there is no definite certainty whether or not the means selected must be one recognized as more dangerous than that prescribed by the master, or even were these points definitely certain, there would always remain the question as to the object of the servant in choosing the method of work, whether it was for his own purpose or in an honest though mistaken idea as to what is best for his master's interests.

in practice to be intolerable, by making the business bear, as part of its operating cost, a part at least of the loss which it causes to those engaged in its operations. Therefore no penalty should be placed upon wrongdoing unless there is reason to believe that thereby the number of accidents may be appreciably diminished. It is obvious, however, that no man should be allowed to exploit the act by intentionally bringing injury upon himself in order to gain a benefit under it.

It has been seen, that while the English cases allow recovery for injuries which a workman sustains by reason of his mere negligence or stupidity, there has existed from the first a tendency, which has become more and more marked in the later cases, to hold that his injuries are either not received in the course of his employment or do not arise out of it, if they are due to his deliberate and selfish disregard of his master's wishes and interests. Almost at the first it was held that while a servant is not denied recovery for injuries due to his mere negligence or stupidity, he might put himself outside the course of his employment by officiously undertaking a work other than that specifically entrusted to him; and while he might be permitted to deviate slightly from his established task, in an honest though mistaken effort to further his master's interests, and though he might do work entirely different from that set him, if necessary to preserve his master's property or financial interests, an injury received because of even a slight deviation for his own purposes, was regarded as sustained outside the course of his employment. And it has been seen that the later cases hold that a risk which a servant encounters by such conduct or by doing, for some private purpose of his own or to lighten his labor, his work in a way different from and more dangerous than that designated by his master or which is prohibited by the latter, is not a risk incidental to the employment, and that the resulting injuries do not arise out of it. His injury is held to arise by reason of his voluntary exposure of himself to a risk not incidental to his employment, but superadded by him for his own convenience. This conclusion is reached by regarding as risks incidental to the employment only those which are inherent in it when carried on in the way and manner which the master has directed.

Under either the earlier or the later view, the employee's right to compensation is made to depend upon his regard for his em-

ployer's will and interests. Phrase it as one will, the servant is given the right to recover if, and only if, he is obedient and faithful; while not deprived of compensation by mere inadvertent wrong or stupidity, he is denied compensation if he deliberately disobeys his employer's directions and officiously acts in defiance of his master's will as expressed in the latter's definition of his servant's duties.

In the last analysis the servant is barred from recovery because of his fault, a species of fault differing, it is true, from any recognized by the common law as a bar to an action of tort, but fault none the less. It differs from and is narrower than contributory negligence, for deliberate action for the employee's own purpose is required; it differs from and is narrower than voluntary assumption of risk, since it requires exposure to a risk not necessitated by the task set by the employer, but it partakes of the nature of each and may be called the assumption of a risk voluntarily and unnecessarily incurred by the servant for purposes of his own and not in the faithful and devoted service of his master.

It may well be that a master should be given full power to regulate his own business, and should be free from liability for injury due to a servant's unwillingness to conform to the system which his master has established, often for the very purpose of protecting his servants from injury. It may well be that deliberate disobedience of orders, especially those designed to protect the servant and his fellows from accident, should bar those injured thereby. If the workman is to be denied compensation because of his misconduct, such denial should be clearly expressed as an exception to the general principle, in some such provision as that found in the English Act of 1897, expressly refusing compensation for injuries attributable to the sufferer's "serious and wilful misconduct," or preferably by specifically enumerating the precise kinds of misconduct which shall bar the right to compensation.

Even if it is desired to refuse compensation to workmen guilty of serious and wilful misconduct, it would seem extremely unwise to adopt as a phrase defining the general nature of the injuries to be compensated words which have been construed by the only court which has yet interpreted them, so as to make even a slight disobedience of orders or a trivial disregard of the master's interests, falling far short of serious and wilful misconduct, a bar to compensa-

tion because the injury resulting therefrom is regarded as not arising out of the employment nor received in the course of it.

The trend of recent American legislation appears on the whole to be against such a limitation of compensation. Many of the more recent acts, enacted and proposed, expressly deny compensation only where the injury is intentionally self-inflicted, and in some cases where it is due to intoxication, deliberately rejecting serious and wilful misconduct as a bar to compensation. The omission of this phrase indicates an intention to regard fault on the part of the workman as utterly immaterial. It is, therefore, even more obviously unwise to adopt in such acts the phraseology of the English act.

There is no doubt something repugnant to all the ideas of one trained in the common law and used to administering its principles, in the thought of permitting a man, injured by his own flagrant misconduct, to obtain compensation from another innocent of all wrongdoing. It is worthy of note that it is only since the passage of the Act of 1906, which gave compensation for death and serious and permanent disablement, notwithstanding the serious and wilful misconduct of the sufferer, that the English courts have definitely construed the act so as to hold that injuries which the servant has brought upon himself by his disregard of his master's wishes and interests do not arise out of the employment. Indeed, this tendency first appears in cases under that act where the employee was injured by his serious and wilful misconduct, and where, under the Act of 1897, he or his dependents would have been barred thereby from compensation. There is every reason to believe that this same repugnance will operate upon American courts, and to expect that, in applying American acts giving compensation to employees even though guilty of serious and wilful misconduct, they will construe the language copied from the English act as it has been construed by the English courts, and will, like them, indirectly introduce a limitation of compensation deliberately rejected by the legislatures. There is certainly no excuse for legislators deluding themselves and the public by providing in one section that only injuries self-inflicted shall be denied compensation, and at the same time adopting, as descriptive of the general nature of the injuries to be compensated, words which, as they know or could readily ascertain, have already been construed in England, and in all probability will be construed in America, as denying com-

pensation for injuries resulting to workmen from misconduct on their part of a sort to which experience has shown workmen as a class to be notoriously prone.

But perhaps both the most fundamental objection, both in theory and in practice, to this phrase, as construed in the British cases, is that it makes the master's liability depend upon the foresight of himself and his servant as to the probability that the servant will be subjected to the risk of injury of the sort which he sustains. Such a conception, while appropriate to determine the extent of duties and rights created by a contract voluntarily entered into, or to determine whether an individual is guilty of wrongful disregard of the rights of others in not preventing harm to them by removing the cause thereof, has no proper place in an act designed to throw upon the business a part of the loss which it in fact causes to those engaged therein, irrespective of the negligence or care with which it is conducted. Even in an elective act the obligation to compensate is not wholly the creature of the consent of the employer. The election is to accept the compensation scheme as prescribed by the act, as an alternative to an increased liability in an action of tort or as an alternative to losing statutory rights already granted. The election is to accept or reject the scheme in its entirety. The nature of the scheme is dictated by the legislature, and the extent of the liability under it is determined by its will and not by the wishes of the parties. To make the foresight of the master the test is to carry into an act in which the fault of the master is absolutely immaterial a conception of cause, as including culpability, appropriate only to tort law in which the defendant must not only be the cause, but the guilty cause, of the plaintiff's harm.⁶¹ Whether the master or the servant had or had not reason to expect injury of the sort suffered or from the cause which in fact produced it, is utterly immaterial in determining whether the business in fact

⁶¹ The restriction of liability even in tort actions to those consequences which are or should have been foreseen, has no relation to the relation of the defendant's act or omission to the plaintiff's injury as cause and effect, but, on the contrary, has relation solely to the moral or social responsibility of the defendant. It is the product of the conception that no man should be forced to make good a harm which he has innocently caused. He is not relieved from liability because he has not caused the harm, but because, though he has caused it, public opinion as interpreted by the courts deems it unfair or unwise to transfer to him, being innocent, the loss which his act has in fact already brought upon the plaintiff.

caused the injury. This depends on the sequence of events and is wholly objective.

In dealing with the causal relation necessary between the employment and the injury, only three courses appear to be open. The first is to regard it as enough that the employment furnishes the occasion for the employee's injury, that the servant by reason of his service is in fact exposed on the occasion of his injury to the force which injures him, whether it be one originating in the business itself or be a force or condition of which the business is in no way the cause. It may be possible to suggest cases where the broad right to compensation is at least seemingly unjust to the master, but the only other logical and workably definite alternative is to give compensation only where the operations of the business or the condition of the plant or premises are the active and immediate cause of the injury. In such cases a greater injustice will be done to the employee. The third alternative is to leave the phrase as it stands, so making — if American courts follow the course of English decision, as they will in all probability do — the foresight of the parties the test and inviting the very difficulties and uncertainties which experience has shown to have resulted therefrom.

One would suppose it to be impossible to find a more uncertain question — one less susceptible of definite proof, the result of which is more difficult to predict — upon the solution of which legal rights could be made to depend than the effect of an infinite variety of circumstances upon the human mind, were it not that the test now discussed makes the right to compensation depend not upon what the parties do actually foresee, but upon what they ought to foresee, under circumstances not actually known but which ought to be known; it introduces that most uncertain factor, the ideal mind of the socially normal man, by whose foresight the rights and liabilities of the parties must be determined. Until, after years of litigation, there is built up an elaborate system of rules determining what under given circumstances must be regarded as foreseeable, the question must always depend upon the circumstances of each case and upon the opinions of the triers of fact thereon. In its nature it is mere matter of opinion in every situation differing in the slightest degree from those already litigated; in practice, experience in those jurisdictions in which this test has been adopted to determine the existence or extent of liability in an action of negligence

has shown it to lead to the very uncertainty and consequent litigation which it is the object of workmen's compensation acts to prevent.

It seems evident that the adoption of the phrase "arising out of and in the course of the employment" is not calculated to secure certainty in the application of such acts, and so to prevent litigation or to eliminate fault on the part of the parties as a factor decisive of liability. Of the two phrases, "in the course of employment" has caused less uncertainty and has attached less importance to the fault of the workman, though even here the results obtained in the application of it are far from satisfactory. It is in the construction and the application of the phrase "arising out of the employment" that the greatest dangers exist. It is, therefore, a matter of congratulation that, in some at least of the American acts, this phrase has been omitted.

It would be presumptuous to attempt to formulate any alternative phraseology. What phraseology should be used must depend upon the nature and the extent of the right to compensation which each legislature may determine to grant. Whatever scheme be adopted, it would be altogether better, in view of the very unfortunate results attained in Great Britain, not to use either phrase, but to select some other words appropriate to accomplish the object in view, using the language of the English act as indicating what to avoid rather than what to copy. No satisfactory result can, the writer is convinced, be accomplished by copying the words of the English act and attempting to avoid the effect of the construction judicially put upon them by qualifications, explanations, or further definition, though even this is better than a blind acceptance of them, time-dishonored as they are.

The writer is not blind to the fact that a satisfactory substitute for the phrase criticized is difficult to draft, and realizes fully how much easier it is to criticize than to construct. The present article is meant solely to direct the attention of future legislators to the dangers that lurk in the blind assumption that since the English act has been in force for some years unamended, therefore it has worked satisfactorily and can be safely copied, and in the hope that with this plainly in view a more satisfactory phraseology can be found. There has been no lack of legal ability on the part of

those who have drawn the acts already in force, and no doubt the problem would now be satisfactorily solved had not the question of the constitutionality of the whole scheme absorbed practically their entire attention to the exclusion of mere matters of draftsmanship.

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FEDERAL EMPLOYERS' LIABILITY ACT OF 1908 AS REGULATION OF INTERSTATE COMMERCE. — The regulation of commerce is one of the many topics which are subjected by the federal Constitution to the control of a dual sovereignty. Primarily the alteration of the laws governing commercial intercourse is a branch of the police power of the several states.¹ Yet the national Congress is, by the Constitution, empowered to exercise its police power over the same general subject matter with this limitation, that it must confine its exercise solely to such regulation as has some substantial connection with commerce between the states and with foreign nations.² With this general principle in view, it would seem that the constitutionality of federal legislation on this subject is dependent almost wholly on a question of fact: May such substantial connection be discovered?

This connection has been discovered in a vast variety of circumstances. It was decided at an early date that Congress could forbid all foreign commerce as a measure of war;³ and that an act that interfered with interstate and foreign commerce could be made an offense against the United States, in spite of the fact that it was an act which was also subject to the police power of the states.⁴ And it is equally clear that Congress does not exceed its powers when it prohibits the carriage of certain

¹ *City of New York v. Miln*, 11 Pet. (U. S.) 102. See *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1.

² *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900; *Patterson v. Bark Eudora*, 190 U. S. 169, 23 Sup. Ct. 821. See *Gibbons v. Ogden*, *supra*, 196; *COOLEY, CONSTITUTIONAL LIMITATIONS*, 7 ed., 856.

³ *United States v. The William*, Fed. Cas. No. 16,700.

⁴ *United States v. Coombs*, 12 Pet. (U. S.) 72.

articles in interstate commerce,⁵ or prescribes the terms and liability under which a common carrier shall transport goods from state to state.⁶

That certain relations between employer and employees engaged in interstate commerce have some substantial connection with the conduct of this traffic and may be regulated by Congress, is well settled. The Safety Appliance Act of 1893 has been upheld in numerous decisions. The courts have taken notice that the interests of interstate commerce require that the lives and limbs of persons so employed be protected by the use of less dangerous instrumentalities of transportation.⁷ So too have they recognized the benefits accruing from the regulation of hours of employment,⁸ and restrictions on the payment of wages.⁹

In ascertaining whether there is any substantial connection between the operation of a statute and interstate commerce, as in deciding other constitutional questions, the only source of information on the subject matter is the judicial knowledge of the court; and accordingly the diversity of the decisions on these questions must be attributed to the differing attitudes of the courts on complicated matters of fact.¹⁰ In the Employers' Liability Cases¹¹ the Supreme Court was unable to discover that interstate commerce was benefited by placing an unusual liability on a carrier, simply because it was engaged in interstate commerce to some extent, and therefore the court declared the act of June 11, 1906, unconstitutional. The decision in the Adair Case¹² is another illustration of the same principle, and may also be criticized as evincing a slightly limited knowledge of the actual situation.¹³ In the recent cases under the Employers' Liability Act of 1908¹⁴ the Supreme Court has taken a liberal view of the situation presented. *Second Employers' Liability Cases*, 223 U. S. 1, 32 Sup. Ct. 169. In upholding the constitutionality of the act, the court, in effect, decided that interstate commerce was beneficially affected, by imposing on common carriers an extraordinary liability to their employees for injuries suffered while engaged therein, even though the source of the injury were some agent of intrastate commerce. Aside from the general principle stated *supra*, it is difficult to discover in this decision more than a declaration of the court's judicial knowledge of matters with which the statute is concerned.

⁵ *Champion v. Ames*, 188 U. S. 321, 23 Sup. Ct. 321.

⁶ *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164.

⁷ *Southern Ry. Co. v. United States*, 222 U. S. 20, 32 Sup. Ct. 2; *Wabash R. Co. v. United States*, 168 Fed. 1.

⁸ *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 31 Sup. Ct. 621.

⁹ *Patterson v. Bark Eudora*, *supra*.

¹⁰ *Cf. People v. Lochner*, 177 N. Y. 145, 69 N. E. 373, and *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539.

¹¹ 207 U. S. 463, 28 Sup. Ct. 141. The act, 34 U. S. STAT. AT LARGE, 1906, 232, applied to all employees of a carrier engaged in interstate commerce, whether the employee was so engaged or not.

¹² *Adair v. United States*, 208 U. S. 161, 28 Sup. Ct. 277. The act, 30 U. S. STAT. AT LARGE, 1898, 424, c. 370, § 10, made it unlawful to discharge an employee engaged in interstate commerce for being a member of a labor union.

¹³ See the dissenting opinion of McKenna, J., in *Adair v. United States*, 208 U. S. 161, 185 *et seq.*, 28 Sup. Ct. 277, 285 *et seq.*

¹⁴ 35 U. S. STAT. AT LARGE, 1908, 65, c. 149. This statute, unlike the Act of 1906, applied only to injuries received while engaged in interstate commerce.

THE DE FACTO DOCTRINE. — Although it is well settled that the acts of *de facto* officers are valid from the point of view of third persons,¹ there is a diversity of opinion as to whether officers appointed by *de facto* officers become *de jure* officers. The early English courts, because of the technical common-law notion of a public office,² repeatedly held that one claiming to be seised of a public office must show a sound legal right.³ A *de facto* election could not be a link in the title of a *de jure* officer.⁴ But the American courts, regarding an office more as a contract⁵ of employment, argue that, as such *de facto* officers can make binding contracts and pass valid titles, they can also pass incontestible titles to those that they elect.⁶ New York, however, follows the former⁷ English view.⁸ A recent case set aside the election of new directors by the *de facto* directors of a private⁹ corporation.¹⁰ *Matter of Ringler & Co.*, 204 N. Y. 30.

The New York court justifies its decision by criticizing the *de facto* doctrine as a whole. It seems to the court to be "one of those legal make-shifts by which unlawful or irregular corporate and public acts are legalized,"¹¹ and a principle to be confined within narrow limits. On such a view the officious person is not an officer at all, but in certain cases the court, on principles analogous to estoppel, will work justice between third parties by refusing to permit his title to be questioned. But does

¹ *Margate Co. v. Hannam*, 3 B. & Ald. 266. See 20 HARV. L. REV. 456 *et seq.*; CON-STANTINEAU, DE FACTO DOCTRINE, § 3 *et seq.*

² See 24 HARV. L. REV. 658.

³ *King v. Lisle*, Andr. 163.

⁴ "If you derive title to a corporate office through A., and the prosecutor shew a judgment of *ouster* against A., it is conclusive against you. . . ." See *King v. York*, 5 T. R. 66, 72.

⁵ A few states have allowed *de facto* officers to recover their salaries on the ground that they are servants of the people. *Erwin v. Mayor*, etc. of Jersey City, 60 N. J. L. 141, 37 Atl. 732. It also would seem that in America a public office is not property. See 14 HARV. L. REV. 218. But it is quite clear that an office is not such a contract of employment as to be within the constitutional prohibition against impairing the obligation of contract. *Butler v. Pennsylvania*, 10 How. (U. S.) 402.

⁶ *Attorney-General ex rel. Fuller v. Parsell*, 99 Mich. 381, 58 N. W. 335; *State ex rel. Mitchell v. Tolan*, 33 N. J. L. 195. "Why is the defendant a *de facto* and not a *de jure* officer? When the defendant is asked: 'By what authority do you hold the office?' he answers, 'by the appointment of the Judge of the Superior Court. And when it is replied, but that Judge was only a Judge *de facto*; the defendant rejoins, that may be so; but all his necessary official acts are valid as to the public and third persons; my appointment was a necessary official act, and therefore, valid; . . ." See *Norfleet v. Staton*, 73 N. C. 546, 549.

⁷ Since 1882, by Act of Parliament, elections conducted in England by *de facto* municipal officers cannot be questioned collaterally. MUNICIPAL CORPORATIONS ACT, 1882 (45 & 46 VICT. c. 50), §§ 42, 102. Canada has always adopted the American view. *In re McPherson v. Beeman*, 17 U. C. Q. B. (Can.) 99; *Lacasse v. Roy*, 8 Quebec Super. Ct. (Can.) 293.

⁸ *People ex rel. Steinert v. Anthony*, 6 Hun (N. Y.) 142. "Without right himself, he cannot confer any on others." *Mayor, etc. of New York v. Flagg*, 6 Abb. Prac. (N. Y.) 296, 302.

⁹ On this question no distinction is made even in the principal case between a public and a private office. See also 3 THOMPSON, CORPORATIONS, § 3893; 3 COOK, CORPORATIONS, § 713.

¹⁰ *Werner, J.*: "It is in terms a paradox to say that one who owes his election or appointment to an unlawful usurpation of power by another, holds his appointment or election *de jure*." *Matter of Ringler & Co.*, 204 N. Y. 30, 45.

¹¹ *Matter of Ringler & Co.*, *supra*, 42.

such a theory satisfactorily explain the cases? It is well settled that if the office that the assumed officer purports to occupy was created by an unconstitutional statute, and hence does not exist in contemplation of law, all the acts of the assumed officer are open to collateral attack.¹² Again, the law is that if the assumed officer does not hold under "color of title" his acts are not valid even with regard to innocent third parties that have had no notice of his want of authority.¹³ If, as the New York court contends, the *de facto* doctrine legalizes unlawful acts for the benefit of innocent third parties, here are two arbitrary limitations that bear no relation to the knowledge of the third parties. No reasons of fairness between the parties can justify such distinctions.

But the language of the majority of American courts seems to show that they have adopted a more liberal view of the *de facto* doctrine. However an office is defined,¹⁴ all will agree that an officer is an individual to whose acts the law attaches special consequences because of the office that he occupies. Conversely it may be argued that when the law attaches similar consequences to the acts of another individual, it is also proper to call him an "officer." There are thus two kinds of officers, both in a primary sense "lawful," for both are recognized by law. The one kind, duly elected, have many rights, as well as powers and duties; the other kind, becoming officers by their own acts, acquire no rights themselves: no right to remain in office;¹⁵ no right to salary;¹⁶ and no right to do anything that a private individual cannot do.¹⁷ But they do acquire the power to change the rights of others: the power to pass titles to others; the power to make contracts; and now generally the power to elect other officers. They acquire these powers because they have become officers by occupying the office. Hence if no office has been created because of the unconstitutionality of a statute they cannot acquire these powers. Neither can they become officers unless they occupy the office under "color of title" just as a disseisor of land must occupy under claim of right. "Color of title" thus distinguishes true officers, both *de jure* and *de facto*, from mere usurpers.

REMOVAL FOR PUBLIC HEALTH OF DAMS BY POLICE POWER OR EMINENT DOMAIN. — The taking of property by eminent domain for a public use is often almost indistinguishable¹ from such deprivations as are merely results of those regulations under the police power for the protection of public health, safety, or morals which are not burdened with a constitutional requirement of compensation.² This is especially true, since a

¹² Norton v. Shelby County, 118 U. S. 425, 6 Sup. Ct. 1121.

¹³ Norfleet v. Staton, *supra*.

¹⁴ An office has been variously defined as a "right," a "charge," a "permanent trust," an "agency." See 2 BL. COMM. 36; United States v. Maurice, 2 Brock. (U. S.) 96, 102; Matter of Hathaway, 71 N. Y. 238; Chark v. Stanley, 66 N. C. 59.

¹⁵ In *quo warranto* proceedings a judgment of *oust* would be pronounced against a *de facto* officer. *In re Delgado*, 140 U. S. 586, 11 Sup. Ct. 874.

¹⁶ See 24 HARV. L. REV. 658.

¹⁷ People *ex rel.* Sullivan v. Weber, 86 Ill. 283.

¹ See 25 HARV. L. REV. 389.

² Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273.

special subject of police regulation, like the public health, may also be the object of an exercise of eminent domain.³ It is clear that, without compensation, property may no more be taken for actual use in the name of public health than for other public purposes.⁴ Thus compensation is required for a building taken for use as a hospital,⁵ but not for one destroyed to protect public health;⁶ for constructing a permanent dike⁷ or drain⁸ on a dry lot to prevent the unhealthy flooding of other land, but not for digging a drain in the swampy land,⁹ or filling in at the expense of the owner.¹⁰

The test is not whether there is a taking or merely an impairing or destroying, for property may be taken in the proper exercise of the police power,¹¹ while destruction of one *res*, incidental to the public use of another, would seem to require eminent domain.¹² The distinction most commonly accepted rests upon whether the particular property is affected because of its utility in promoting a projected public use, or because of its participation in causing the public detriment which is regulated or removed.¹³

In a recent case a statute declaring that a mill-privilege which remained useless without repair for five years should cease, as against the public health, convenience, and welfare, and that commissioners for those purposes might without compensation remove the dam and clean out the watercourse, was held to authorize taking private property for public use without compensation, in violation of the state constitution.¹⁴ *Kiser v. Board of Commissioners of Logan County*, 97 N. E. 52 (Oh.). It seems that the police power may be properly exercised to remove unhealthy conditions by cleaning out a non-navigable stream,¹⁵ or by compelling a railroad to modify the opening of its bridge to permit the enlargement of a drain,¹⁶ or to compel the owner of a dam to construct a fishway at

³ *Sweet v. Rechel*, 159 U. S. 380, 16 Sup. Ct. 43; *Matter of Ryers*, 72 N. Y. 1. See 1 LEWIS, EMINENT DOMAIN, § 307.

⁴ See *Chicago, etc. Ry. Co. v. People ex rel. Drainage Commissioners*, 200 U. S. 561, 592, 26 Sup. Ct. 341, 350; FREUND, POLICE POWER, § 511.

⁵ See *Spring v. Inhabitants of Hyde Park*, 137 Mass. 554, 559.

⁶ *Theilan v. Porter*, 14 Lea (Tenn.) 622; *Ferguson v. City of Selma*, 43 Ala. 398.

⁷ *Matter of Cheesebrough*, 78 N. Y. 232.

⁸ *Cavanagh v. City of Boston*, 139 Mass. 426, 1 N. E. 834. But cf. *Commonwealth v. Tewksbury*, 11 Met. (Mass.) 55.

⁹ *Donnelly v. Decker*, 58 Wis. 461, 17 N. W. 389; *Griffith v. Pence*, 9 Kan. App. 253, 59 Pac. 677.

¹⁰ *Bliss v. Kraus*, 16 Oh. St. 54; *Bancroft v. City of Cambridge*, 126 Mass. 438.

¹¹ *Commonwealth v. Carter*, 132 Mass. 12. See 3 HARV. L. REV. 189, 195, note.

¹² As where a railroad tears down a building in order to use its site belonging to a different owner. Cf. *Kersey v. Schuylkill River, etc. R. Co.*, 133 Pa. St. 234, 19 Atl. 553.

¹³ See *Philadelphia v. Scott*, 81 Pa. St. 80, 85; FREUND, POLICE POWER, § 511; RANDOLPH, EMINENT DOMAIN, § 23.

¹⁴ The facts of the case are not reported. The result may be supported on the ground that this particular act is not sufficiently express in limiting the authority to cases of detriment to public health or safety. But although the court does not cite authorities or apparently recognize the difficulty here discussed, its language is broad enough to deny the power of the state to remove dams without compensation under the police power.

¹⁵ *Brown v. Keener*, 74 N. C. 714.

¹⁶ *Chicago, etc. Ry. Co. v. People ex rel. Drainage Commissioners*, *supra*.

his own expense.¹⁷ The case where the public health requires the complete removal of the dam is probably the closest that could be stated. By the test already suggested, it would apparently fall under the police power, but it has been declared, by way of *dictum*, to be eminent domain, requiring compensation.¹⁸ There is, however, an essential difficulty in saying that any property is taken to be used for the public.¹⁹ Rather a stream is restored to its natural state by removing an obstruction producing unhealthy conditions.

The destruction of property where necessary in the public interest is familiar to the police power,²⁰ but rare under eminent domain.²¹ Assuming that it cannot be done, under authority only to abate nuisances, unless the conditions can be adjudged to constitute a nuisance according to common law,²² yet apparently the police power is adequate for appropriately authorizing the removal of a detriment to public health not within the common-law definition of a nuisance.²³ Conceding that justice and good faith would oblige the legislature to compensate the owner of such a dam, especially if its original erection was authorized or consideration exacted in return,²⁴ yet, if the constitution recognizes this obligation as a legal requirement only in cases of taking for public use, it should not be for the court to strain its terms in order to overthrow a statute justified by the police power.²⁵

CORPORATION'S RIGHT TO AVOID TRANSACTIONS WITH DIRECTORS. — The determination of a corporation's right to avoid transactions in which any of its directors are adversely interested, and which have not been ratified by the shareholders, raises problems somewhat similar to those presented in the analogous situation of transactions between an ordinary principal and his agent.¹ It is established doctrine that in the latter case

¹⁷ *State v. Beardsley*, 108 Ia. 396, 79 N. W. 138; *Parker v. People*, 111 Ill. 581. *Contra*, *Woolever v. Stewart*, 36 Oh. St. 146.

¹⁸ See *Miller v. Craig*, 11 N. J. Eq. 175, 186; *Talbot v. Hudson*, 16 Gray (Mass.) 417, 427. In the latter case the object was to drain meadows in promotion of agriculture.

¹⁹ See *Livingston v. Ellis County*, 30 Tex. Civ. App. 19, 21, 68 S. W. 723, 724.

²⁰ *Gardner v. Michigan*, 199 U. S. 325, 26 Sup. Ct. 106; *Newark, etc. Ry. Co. v. Hunt*, 50 N. J. L. 308, 12 Atl. 697. See *Russell v. Mayor, etc. of New York*, 2 Den. (N. Y.) 461.

²¹ Merely the amount or value of the property which it is necessary to take should not turn the case into one of eminent domain.

²² *People ex rel. Copcutt v. Board of Health*, 140 N. Y. 1, 35 N. E. 320; *Yates v. Milwaukee*, 10 Wall. (U. S.) 497.

²³ See *Miller v. Craig*, *supra*, 185; *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 539, 11 N. E. 929, 936; *TIEDEMAN, LIMITATIONS OF POLICE POWER*, § 122. *Cf. Rideout v. Knox*, 148 Mass. 368, 19 N. E. 390.

²⁴ See *Stone v. Mississippi*, 101 U. S. 814.

²⁵ So a city may cause the removal of a powder magazine despite having formerly sold the land for its location. *Davenport & Morris v. Richmond City*, 81 Va. 636. *Cf. Dunham v. City of New Britain*, 55 Conn. 378, 11 Atl. 354.

¹ A peculiar problem is presented by contracts of corporations to vary the duties imposed upon their directors, not by contract, but by the relation of directorship. Such contracts may be obnoxious for some reason of policy not applicable to all contracts

the principal can avoid the transaction if any unfairness was practiced upon him by the agent;² but if the agent acted fairly, the transaction is not voidable,³ even in the extreme case where the agent represented both himself and his principal.⁴ Similarly, a corporation can avoid a transaction in which any of its directors were adversely interested, if they acted unfairly.⁵ But when the directors acted with entire fairness, it is not so easy to achieve a result identical with that in the analogous case of the ordinary principal. A more stringent rule may be required for corporate transactions in which directors are adversely interested, because the latter have far greater opportunity to practice unfairness upon their principal than have ordinary agents. This increased danger of unfair dealing is due to the greater control which a director has over his principal and the other agents of his principal,⁶ and to the fact that it is impossible for a director to give notice of his adverse interest to his principal, an indispensable requirement for fair dealing by an agent with an ordinary principal.⁷ Do these two difficulties necessitate a rule allowing a corporation to avoid any contract in which its directors are adversely interested, irrespective of the fairness of the latter? The lack of such a rule will to some extent permit, in spite of the closest scrutiny by the courts, the exercise of fraud upon corporations by their directors.⁸ But the existence of such a rule will deprive corporations of some measure of the freedom enjoyed by ordinary principals in doing business and choosing agents; for the possibility of subsequent avoidance by the corporation of transactions in which its directors are adversely interested will discourage both dealings by directors with their corporations and acceptance of directorships by those desirous of dealing with the corporation or of serving other corporations dealing with it. That these considerations, and especially the former, are of importance, is illustrated by those cases in which a corporation, refused aid by everyone but its directors, has been saved from insolvency only by dealings with them.⁹

The difficulty of determining whether a corporation will be damaged more by the unfair dealing of its directors or by the curtailment of the corporation's transactions with its directors and of its choice of directors has resulted in a conflict of authority, largely confined to a conflict between the cases of different periods. Most of the earlier decisions adopted the doctrine of voidability of all transactions, irrespective of their fairness.¹⁰ A recent decision is one of the many later holdings to the contrary,

between corporations and their directors. This special class of contracts, so far as it is affected by such a rule of policy, is not dealt with in this note.

² *People on relation of Plugger v. Township Board of Overseers*, 11 Mich. 222.

³ *Rochester v. Levering*, 104 Ind. 562, 4 N. E. 203.

⁴ *Burke v. Bours*, 98 Cal. 171, 32 Pac. 980.

⁵ *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456; *Electric Light Co. v. Bates*, 68 Vt. 579, 35 Atl. 480.

⁶ An instance of the exercise of such control is *Pickett v. School District*, 25 Wis. 551.

⁷ *Burke v. Bours*, 92 Cal. 108, 28 Pac. 57.

⁸ See *Stewart v. Lehigh Valley R. Co.*, 38 N. J. L. 505, 522. But see *Wyman v. Bowman*, 127 Fed. 257, 273.

⁹ *Tatem v. Eglanol Mining Co.*, 42 Mont. 475, 113 Pac. 295.

¹⁰ *Wilbur v. Lynde & Hough*, 49 Cal. 290; *Munson v. S., G. & C. R. Co.*, 103 N. Y. 58, 8 N. E. 355. It should be noted that *Aberdeen R. Co. v. Blaikie, Bros.*, 1 Macq. 461, an early case usually cited in this connection, is a Scotch case.

which have largely displaced the older view. *Wainwright v. P. H. & F. M. Roots Co.*, 97 N. E. 8 (Ind.). Thus, by the growing weight of authority transactions of corporations, in which transactions any,¹¹ or even a majority,¹² of its directors are adversely interested, whether as contracting parties or as directors of the other contracting party,¹³ cannot be avoided by the corporation if no unfairness was practiced upon it by the directors adversely interested.

ASSENT OF BUYER TO PASSING OF TITLE ON DELIVERY TO CARRIER. — Delivery of goods to the carrier under a contract to sell ordinarily passes title to the buyer,¹ but if the shipment is not strictly in accordance with the contract, it is said that the buyer must assent.² In the absence of any contract, title could not pass until the time that the buyer accepted the offer, and assented to receive title;³ and it is often said that the waiver of minor provisions, as the acceptance of a new modified contract, has a similar effect.⁴ But it seems probable that such a waiver vests the title in the buyer from the time of the shipment.⁵ A waiver is not an acceptance. It is strictly the relinquishment under certain conditions of a legal right or defense.⁶ But the courts seem to feel that one party to a contract should not suffer from the non-performance of minor conditions inserted solely for his own benefit, and thus in effect give him the power to treat the contract as if it had never contained such a condition. It follows that his assent relates back to the time of shipment. The doctrine is analogous to ratification,⁷ and it would seem that it could not operate to defeat the rights of purchasers from the vendor during the interval.⁸ There seems no reason in justice to prevent its ousting a trustee in bankruptcy, or even attaching creditors.⁹

A recent case suggests a third possibility. *Lovell v. Newman*, not yet reported (C. C. A., Fifth Circ.). The buyer had been induced by fraudulent bills of lading to pay for cotton before it was shipped, and did not assent to the late shipment until after the bankruptcy of the seller. The court said that the assent of a creditor is presumed in the absence of subsequent dissent. It can only mean that the title passed by operation of law

¹¹ *Beach v. McKinnon*, 148 Fed. 734; *Vonnoh v. Sixty-Seventh St. Atelier Building*, 55 N. Y. Misc. 222, 105 N. Y. Supp. 155.

¹² *Wyman v. Bowman*, *supra*; *Tatem v. Eglanol Mining Co.*, *supra*.

¹³ *Leavenworth v. Chicago, etc. Ry. Co.*, 134 U. S. 688, 10 Sup. Ct. 708.

¹ *Fragano v. Long*, 4 B. & C. 219.

² See *Porter Mfg. Co. v. Edwards*, 29 Hun (N. Y.) 509; *Woodruff v. Noyes*, 15 Conn. 335.

³ *The Frances*, 8 Cranch (U. S.) 359; *Felthouse v. Bindley*, 11 C. B. N. s. 869.

⁴ See *Hanauer v. Bartels*, 2 Colo. 514, 521.

⁵ *Richardson v. Dunn*, 2 Q. B. 218; *Orcutt v. Nelson*, 1 Gray (Mass.) 536; *Peters v. Elliott*, 78 Ill. 321. See *Finn v. Clark*, 12 All. (Mass.) 522, 525.

⁶ See *San Bernardino Investment Co. v. Merrill*, 108 Cal. 490, 494, 41 Pac. 487, 488.

⁷ See *Reid v. Field*, 83 Va. 26, 33, 1 S. E. 395, 399. It is not ratification because only by a fiction can the shipper be said to act as agent, and because the concurrence of assent and not the relation of agency is necessary to pass title.

⁸ Cf. *Bird v. Brown*, 4 Exch. 786.

⁹ *Peters v. Elliott*, *supra*.

without the buyer's actual assent; and that by his dissent he has the power to divest that title *ab initio*. Rescission for fraud or breach of warranty has this effect only from the time of its occurrence.¹⁰ But there is an analogy in the case of gifts delivered to a third person, or to a trustee, where the assent of the donee or *cestui que trust* has always been "presumed."¹¹ An early English case first extended the doctrine to creditors,¹² and, in spite of subsequent disapproval by English judges,¹³ it was followed in New York.¹⁴ The same result was reached independently from the same analogy by the Supreme Court of the United States in 1850.¹⁵ In a similar line of cases the principle does not seem to have been considered,¹⁶ and the infrequency of its application makes its validity doubtful. There is a radical difference between a donee and a creditor, for, whereas the former gives up nothing and the possibility of his dissenting may safely be disregarded, a creditor must surrender his debt. At the moment of shipment there is about as little reason to presume assent by a creditor as by an ordinary contractor. The result would be practically the same if the relation back of assent is allowed to oust the rights of attaching creditors, and in both cases the reasons for the result are those above referred to. As an original question, presumption of assent might be more convenient; but it is now impossible to establish it in the case of ordinary contractors, and there seems no valid line of distinction.

THE RIGHT OF HUSBAND TO SUE WIFE FOR ALIMONY. — Not only are virtually all the definitions of alimony that appear in the books limited in their terms to an allowance proceeding from the husband to the wife,¹ but it has frequently been expressly decided that the law does not recognize a right in the husband to alimony.² The property which equity in granting a divorce allows a husband on the ground that, although title to it is in the wife, it has been derived through the husband under circumstances which make it inequitable for the wife to retain it,³ is sometimes incorrectly referred to as alimony. On principle, however, it is

¹⁰ *Thompson v. Conover*, 32 N. J. L. 466. Cf. *Hotchkiss v. Higgins*, 52 Conn. 205.

¹¹ *Davis v. Ney*, 125 Mass. 590; *Doe v. Knight*, 5 B. & C. 671. Cf. *Goss v. Singleton*, 2 Head (Tenn.) 67, 77.

¹² *Atkin v. Barwick*, 1 Str. 165. Cf. *Smith v. Field*, 5 T. R. 402.

¹³ See *Neate v. Ball*, 2 East 117, 124; *Alderson v. Temple*, 4 Burr. 2235, 2239.

¹⁴ *Brown v. Bowe*, 35 Hun (N. Y.) 488; *Sturtevant v. Orser*, 24 N. Y. 538. Cf. *Berly v. Taylor*, 5 Hill (N. Y.) 577.

¹⁵ See *Grove v. Brien*, 8 How. (U. S.) 429, 440. Cf. *Tompkins v. Wheeler*, 16 Pet. (U. S.) 106; *Brooks v. Marbury*, 11 Wheat. (U. S.) 78.

¹⁶ *Walter v. Ross*, 2 Wash. C. C. (U. S.) 283; *Bailey v. Hudson River R. Co.*, 49 N. Y. 70; *Straus v. Wessel*, 30 Oh. St. 211. These cases, although they treat a factor under advances as a vendee, refuse to do so unless he has ordered the consignment.

¹ See *Martin v. Martin*, 65 Ia. 255, 256, 21 N. W. 595, 596; 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION, § 1386; GODOLPHIN, ABR. ECCL. LAWS, 508.

² *Somers v. Somers*, 39 Kan. 132, 17 Pac. 841; *Groth v. Groth*, 69 Ill. App. 68. In some jurisdictions, by statute, a husband may obtain alimony. See R. I. GEN. LAWS, 1909, c. 247, § 8; 1 PELL'S REVISED N. C., 1908, c. 31, § 1565.

³ *Meldrum v. Meldrum*, 15 Colo. 478, 24 Pac. 1083. See note to *Greene v. Greene*, 4 L. R. A. 110.

wholly distinct from alimony technically so called as a support out of the wife's property.

Of recent years it has been thought that a tendency could be observed, resulting from the passage of the numerous statutes removing the common-law disabilities of married women, to place the wife and husband on an equality as regards this question.⁴ The first decision, however, in a court of last resort which manifests such a tendency, appears to be a recent North Dakota case, in which it was held that a husband, indigent and unable to earn a livelihood for himself, might recover alimony in a separate suit entirely apart from divorce proceedings.⁵ *Hagert v. Hagert*, 133 N. W. 1035 (N. D.). Although the court rested its decision in part on a statute which entitled the husband to support from his wife under such circumstances,⁶ it clearly indicates that it does not regard the statute as essential to its decision.

The argument of the court, amplified in the light of other cases in which the same question has been litigated,⁷ would seem to be: (1) the wife's right to alimony is based on her right to support from her husband,⁸ which in turn was based at common law on the fact that her husband was vested with all her property immediately available for support, and entitled to her services; (2) inasmuch as the enabling statutes have removed the reason for the wife's right to support, the right itself should cease; (3) since that right, however, is too well established to be abolished, justice requires that a corresponding right be given to the husband under certain circumstances. This line of reasoning, it is submitted, cannot be sustained. In the first place, there would seem to be a deeper reason than that suggested for the wife's right to support from her husband, namely, the fact that the woman is in the nature of things dependent on the man. That this is recognized even to-day, despite the enabling statutes, is apparent from the presence on many statute-books of laws imposing criminal penalties on a husband for desertion, and the absence of any such statute relating to wives.⁹ Moreover, even should it be admitted that the reason for the wife's right to support had ceased, it would seem that the denial of the husband's right to support is quite as well settled as the recognition of the wife's right to it,¹⁰ and hence the argument proves only that the right should be denied the wife.¹¹ Finally, even

⁴ See note to *Greene v. Greene*, 34 L. R. A. 110; 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION, § 1387.

⁵ On the question whether in the absence of statute a wife can bring a suit for alimony apart from divorce proceedings, there is a conflict of authority. The better view seems to sustain such an action. *Daniels v. Daniels*, 9 Colo. 133, 10 Pac. 657. See SCHOULER, HUSBAND AND WIFE, § 485. *Contra*, *Clarke v. Burke*, 65 Wis. 359, 27 N. W. 22. See 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION, § 1388.

⁶ If there is such a statute, the husband, it has been held, can enforce the right it gives him by a decree for alimony. *Livingston v. Superior Court of Los Angeles County*, 117 Cal. 633, 49 Pac. 836. In view of this, the decision, at least, in *Hagert v. Hagert*, 133 N. W. 1035 (N. D.), would seem to be correct.

⁷ See especially opinion in *Groth v. Groth*, 28 Chic. Leg. N. 348, reversed in 69 Ill. App. 68. For a comment on the decision in the lower court see 10 HARV. L. REV. 177.

⁸ See *Harris v. Harris*, 31 Grat. (Va.) 13, 17.

⁹ See 2 PELL'S REVISAL OF N. C., 1908, c. 81, § 3355; 1 COBBEY, NEB. ANN. STAT., 1909, § 2381.

¹⁰ See *Greene v. Greene*, 49 Neb. 546, 552, 68 N. W. 947, 949; *Somers v. Somers*, 39 Kan. 132, 136, 17 Pac. 841, 846.

¹¹ So it has been held that, in view of modern statutes permitting married women to

though the denial of the husband's right were not equally well settled, it is plain that the step which, it is claimed, is required by justice is not a new application of an existing common-law principle, but the creation of a new principle. Such a step would be better taken by statute and not accomplished by sheer judicial legislation.¹²

RECENT CASES.

ATTORNEYS — RELATION BETWEEN ATTORNEY AND CLIENT — ATTORNEY'S CONSENT TO HEARING BEFORE LESS THAN FULL COURT. — A statute provided that every appeal to a certain court should, when the subject-matter was a final order, be heard before not less than three judges, unless all parties filed a consent to its being heard before two judges. The parties themselves not being present in court when such an appeal was called, their counsel filed a written consent that the appeal should be heard before the two judges present. *Held*, that the two judges may hear the appeal. *Haworth v. Pilbrow*, [1912] Wkly. Notes 6 (Eng., C. A., Dec. 12, 1911).

An attorney has been said to be the general agent of the client in all matters which may reasonably be expected to arise for decision in the cause. See *Prestwich v. Poley*, 18 C. B. N. S. 806, 816. He has complete authority over the suit, the mode of conducting it, and all that is incident to it, though not over collateral matters. See *Swinfen v. Lord Chelmsford*, 5 H. & N. 890, 922. It is well settled that an attorney has the power to consent to a reference of the cause to arbitrators without special authority from his client. *Filmer v. Delber*, 3 Taunt. 486; *Brooks v. New Durham*, 55 N. H. 559. Cases of this class rest upon the principle that authority to prosecute a suit implies a power to adopt any mode of prosecution which the law provides. *Buckland v. Conway*, 16 Mass. 395; *Smith v. Bossard*, 2 McCord Eq. (S. C.) 406. The principal case seems within this rule. The statute, as amended, made legal the trial of a final appeal before two judges. STAT. 38 & 39 VICT. c. 77, § 12; STAT. 62 & 63 VICT. c. 6, § 1. Hence the consent of the attorney to this mode of trial is within his implied powers and in such a case is the consent of the client himself.

BANKS AND BANKING — DEPOSITS — SPECIAL DEPOSIT OF CHECK AS COLLATERAL SECURITY. — A bank discounted notes for the plaintiff and took from him as collateral security a check for \$2000, charging his account with \$2000. The bank suspended payment. The notes were duly paid. The plaintiff sued to recover the \$2000 left as collateral security. *Held*, that he must share as a general creditor. *Richardson v. Cheney*, 146 N. Y. App. Div. 686, 131 N. Y. Supp. 594.

When a bank discounts notes, and extends credit for their value, it is a simple debtor. *Carstairs v. Bates*, 3 Campb. 301. The ordinary relation of banker to depositor is that of debtor. *Marine Bank v. Fulton Bank*, 2 Wall. (U. S.) 252. If the depositor agrees not to use part of his credit, the banker remains no less a debtor. But if the collateral security is deposited to be returned *in specie*, the transaction constitutes a bailment. *Jenkins v. National Village Bank*,

hold property and depriving the husband of his right to her services, the husband is no longer liable for debts of his wife contracted before marriage. *Howarth v. Warmser*, 58 Ill. 48.

¹² See 2 BISHOP, MARRIAGE AND DIVORCE, 5 ed., § 469.

58 Me. 275. If the bank is not allowed to mix the fund with its general assets, there is a trust. *McLeod v. Evans*, 66 Wis. 401, 28 N. W. 173; *Harrison v. Smith*, 83 Mo. 210. Deposits for a special purpose, such as security, have often been called trusts. *People v. City Bank of Rochester*, 96 N. Y. 32; *Kimmel v. Dickson*, 5 S. D. 221, 58 N. W. 561. Whether they are is essentially a question of fact. *Mutual Accident Association v. Jacobs*, 141 Ill. 261, 31 N. E. 414; *Anderson v. Pacific Bank*, 112 Cal. 598, 44 Pac. 1063. Ordinarily, when money is deposited, the bank may use it as its own. It merely promises to pay over a similar amount when the special purpose is accomplished. *Hill v. Smith*, 12 M. & W. 618. In the absence of special circumstances to show that the fund is to be kept intact, the deposit creates only a debt. *Mulford v. People*, 139 Ill. 586, 28 N. E. 1096. Thus a deposit to be paid to a third party may be withdrawn before the beneficiary accepts. *Brockmeyer v. Washington National Bank*, 40 Kan. 376, 19 Pac. 855; *First National Bank v. Higbee*, 109 Pa. St. 130.

BILLS OF PEACE — APPLICABILITY TO NEGLIGENCE CASES. — An explosion in the complainant's mine killed 110 workmen, whose administrators, the defendants, sued the complainant at law under the Employers' Liability Act. The complainant's bill asked to have these suits enjoined, and its liability determined in equity, and damages assessed in equity if it should be found liable. *Held*, that the case is not within equity jurisdiction. *Southern Steel Co. v. Hopkins*, 57 So. 11 (Ala.).

Pomeroy's rule that the mere presence of a single issue in many suits against the same person is a basis of equitable interposition has been much disputed. See 1 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 264, note (b). It receives its severest test when applied to enjoining several suits for injuries caused by a single act of the complainant, for courts hesitate to deny jury trials in such cases. If the complainant presents to the equity court an issue of contributory negligence, or of damages, with each defendant, so that no simplification would result from a single trial, Pomeroy's rule does not apply; but where a single issue is presented, by the complainant's alleging absence of negligence on his part, jurisdiction should be taken. See 1 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 251½. But courts failing to appreciate this distinction have rejected Pomeroy's rule altogether. *Tribette v. Illinois Central R. Co.*, 70 Miss. 182, 12 So. 32; *Ducktown Sulphur, Copper, & Iron Co. v. Fain*, 109 Tenn. 56, 70 S. W. 813; *Vandalia Coal Co. v. Lawson*, 43 Ind. App. 226, 87 N. E. 47. It is to be regretted that the Alabama court, in overruling a former decision based on Pomeroy's rule, while now recognizing that the case was not within the rule, nevertheless repudiates the rule. Only one opinion adopts Pomeroy's rule in a negligence case. *Whillock v. Yazoo & Mississippi Valley R. Co.*, 91 Miss. 779, 45 So. 861 (tacitly overruling *Tribette v. Illinois Central R. Co.*, *supra*).

BOUNDARIES — PAROL AGREEMENT TO ESTABLISH BOUNDARY. — The owner of a lot conveyed a part of it to the defendants by a deed in which the boundaries were described by courses and distances. The vendor pointed out the boundary to the purchaser and the latter erected a house along the line indicated. The plaintiff by mesne conveyances acquired the adjoining portion of the lot and discovered that the established line did not correspond with the deed. The plaintiffs and each of their predecessors had been shown the land prior to their respective purchases. *Held*, that the boundary established by the parol agreement should govern. *Price v. De Reyes*, 119 Pac. 893 (Cal.).

A parol agreement between adjoining landowners as to the location of a disputed boundary, followed by acquiescence in possession according to the agreement, is binding. *Steidl v. Link*, 246 Ill. 345, 92 N. E. 874; *Tritt v. Hoover*, 116 Mich. 4, 74 N. W. 177. If the description in the deed is ambiguous, such an agreement is not within the Statute of Frauds, as it involves no transfer

of title, but merely an application of the language of the instrument. *Blair v. Smith*, 16 Mo. 273; *Hagey v. Detweiler*, 35 Pa. St. 409. But if the description is clear, the agreement is avoided by the statute, as it involves an actual transfer of land. *Olin v. Henderson*, 120 Mich. 149, 79 N. W. 178; *Vosburgh v. Teator*, 32 N. Y. 561. Yet it has been held that a line thus marked out and acted upon is conclusive, even when the description is certain. *Helm v. Wilson*, 76 Cal. 476, 18 Pac. 604. Cf. *Knowles v. Tothaker*, 58 Me. 172. It seems just that the original parties or a purchaser with notice should be estopped to dispute the validity of such an agreement, but it is difficult to see how a purchaser who acted in reliance on the deeds without notice of the agreement could be affected by it. *McKinney v. Doane*, 155 Mo. 287, 56 S. W. 304. The principal case may be supported on the ground that the purchasers, having seen the property, had notice of its agreed bounds. *Bartlett v. Young*, 63 N. H. 265.

CONSTITUTIONAL LAW — CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONS — RIGHT OF COUNTY TO TEST CONSTITUTIONALITY OF STATUTE. — A statute authorized the expenditure of state money for certain roads within certain counties. The plaintiff county sought to restrain the state officers from proceeding under the statute on the ground that it was unconstitutional. The county was not required to contribute in taxes as a corporation, and its property rights were not affected. *Held*, that the county has no legal capacity to sue. *County of Albany v. Hooker*, 204 N. Y. 1, 97 N. E. 403.

No person whose rights are not directly affected by a statute can object to its constitutionality. *Clark v. Kansas City*, 176 U. S. 114, 20 Sup. Ct. 284. The doctrine is general that, in the absence of a statute imposing the duty on some official, any taxpayer may enjoin the misapplication of public funds by municipal officers, on the ground that the act, in increasing taxation, directly injures him. *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249. But where his individual interests are not involved, the taxpayer cannot sue. *Prince v. Crocker*, 166 Mass. 347, 44 N. E. 446. Counties are local subdivisions of the state. *Board of Commissioners of Hamilton County v. Mighels*, 7 Oh. St. 109. They are not protectors of private interests or property of taxpayers and cannot intervene to prevent injuries to them. See *People v. Ingersoll*, 58 N. Y. 1, 29. So a county cannot complain if the state regulates the funds to be raised to pay county debts of a public character. *State ex rel. Dillon v. Braxton County Court*, 60 W. Va. 339, 55 S. E. 382; *City Council of City and County of Denver v. Board of Commissioners of Adams County*, 33 Colo. 1, 77 Pac. 858. In the principal case, the county in its corporate capacity will suffer no injury, since it is not a taxpayer; and, as the court points out, the public by authorized proceedings should have brought the suit. Clearly if the funds of the county as a corporation, in its possession or to which it was equitably entitled, were being misappropriated, the county could sue. *Bridges v. Board of Supervisors of County of Sullivan*, 92 N. Y. 570; *Woods v. Board of Supervisors of Madison County*, 136 N. Y. 403, 32 N. E. 1011.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — STATUTE REQUIRING COMMITMENT FOR REFUSAL TO TESTIFY BEFORE LEGISLATIVE COMMITTEE BY JUDGE OF COURT WITHOUT HEARING. — A statute provided that when a witness duly subpoenaed refused without reasonable cause to testify before a committee of the legislature, he might by warrant be committed to jail until he submitted to do so, by a judge of any court of record upon proof by affidavit of the facts. *Held*, that the statute is unconstitutional. *In re Barnes*, 132 N. Y. Supp. 908 (App. Div.).

Notice and an opportunity to be heard are, as a general rule, essential elements of due process of law. See *Simon v. Craft*, 182 U. S. 427, 436, 21 Sup. Ct. 836, 839. One apparent exception to the rule, however, has always existed

in the case of summary commitments for contempt committed in the presence of the court. *Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. 77; *Thwing v. Dennie*, Quincy (Mass.) 338. But in the case of a contempt either criminal or civil, not committed in the presence of the court, there must always be a hearing and, in most cases, notice before attachment. *Ex parte Stricker*, 109 Fed. 145; *Ex parte Langdon*, 25 Vt. 680. But *cf. Ex parte Haley*, 37 Mo. App. 562. The legislature may also punish a contempt, such as a refusal to testify, committed before it or its committee carrying on an investigation for legislative purposes. *People ex rel. McDonald v. Keeler*, 99 N. Y. 463, 2 N. E. 615; *Lowe v. Summers*, 69 Mo. App. 637. But where the contempt is committed before a committee, it cannot be punished by the committee but must be reported to the legislative body for its action. See *In re Davis*, 58 Kan. 368, 379, 49 Pac. 160, 163; COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 193. As held in the principal case, therefore, it would seem not due process of law to allow a court to punish without notice or a hearing a contumacious act which not only did not occur in its presence but was not a contempt of the court but of the legislature.

CONTEMPT — POWER TO PUNISH FOR CONTEMPT — POWER OF SUPREME COURT TO PUNISH FOR CONTEMPT OF LOWER COURT. — A newspaper published statements tending to prove that a person accused of murder and remanded to appear before a lower court was guilty. Application was made to the Supreme Court to punish the members of the staff of the paper for contempt. *Held*, that the Supreme Court has jurisdiction in the matter. *In re Packer*, [1911] V. L. R. 401.

Every superior court possesses an inherent power of employing contempt proceedings to prevent any interference with its administration of justice. *Ex parte Fernandez*, 10 C. B. N. S. 3; *Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. 77. This power can be exercised only by the court whose authority is being defied. *Androscoggin & Kennebec R. Co. v. Androscoggin R. Co.*, 49 Me. 392; *People v. Placer County Judge*, 27 Cal. 151. Accordingly, the few American cases on the subject hold that an upper court cannot punish for contempt of a lower court. *Lessee of Penn v. Messinger*, 1 Yeates (Pa.) 2; *In re Emery*, 149 Mich. 383, 112 N. W. 951. The earlier English cases also took this view. *Rex v. Burchett*, 1 Str. 567; *In the Matter of an Application for an Attachment for Contempt of Court*, 2 T. L. R. 351. The recent English authorities, however, decide that where a lower court is powerless to prevent an interference with its administration of justice, the upper court will intervene by an attachment for contempt. *Rex v. Davies*, [1906] 1 K. B. 32; *Rex v. Clarke*, 103 L. T. 636. These authorities argue that the purpose of contempt proceedings is to protect the administration of justice rather than the dignity of any court. Yet it is because a particular court is being prevented from exercising its proper functions that the summary contempt process is allowed. See *United States v. Hudson*, 7 Cranch (U. S.) 32, 34; *Cartwright's Case*, 114 Mass. 230, 238. Indictment is the proper remedy for the public wrong involved. *Rex v. Fisher*, 2 Camp. 563. The reasoning of the principal case is therefore open to criticism, although the result accomplished is perhaps desirable.

COPYRIGHTS — COMMON-LAW RIGHT: PROPERTY IN MUSICAL IDEA. — The plaintiff was the author of the music of a song, on each published copy of which appeared the reservation "Public performance strictly forbidden." The defendant without authorization transferred the music to phonograph records. *Held*, that the plaintiff is not entitled to an injunction against the making or selling of the records. *Monckton v. Gramophone Co.*, 132 L. T. J. 295 (Eng., C. A., Jan. 24, 1912).

For a discussion of the principles involved, see 19 HARV. L. REV. 134.

CORPORATIONS — DIRECTORS AND OTHER OFFICERS — DE FACTO DIRECTORS. — The *de facto* directors of a private corporation, in due form elected other directors to fill vacancies in their board. An action, in statutory form, was brought to oust all the directors from office. For the new directors it was argued that they had become *de jure* officers, because elected by officers acting in the due course of their assumed duties. *Held*, that the election of all the directors be set aside. *Matter of Ringler & Co.*, 204 N. Y. 30. See NOTES, p. 550.

CORPORATIONS — DIRECTORS AND OTHER OFFICERS — DIRECTORS' ADVERSE INTEREST IN CONTRACT WITH CORPORATION. — A director of a corporation, who was also the superintendent of its factory, contracted with it through its president to superintend its proposed branch factory. *Held*, that the corporation cannot avoid the contract. *Wainwright v. P. H. & F. M. Roots Co.*, 97 N. E. 8 (Ind.). See NOTES, p. 553.

CORPORATIONS — INSOLVENCY OF CORPORATION — VOLUNTARY PETITION IN BANKRUPTCY BY DIRECTORS. — By resolution of the board of directors without a vote of the stockholders, a corporation filed a voluntary petition in bankruptcy. *Held*, that the adjudication will not be set aside. *In re Kemwood Ice Co.*, 189 Fed. 525 (Dist. Ct., D. Minn.).

The Bankruptcy Act of 1867 permitted a voluntary petition by a corporation by a vote of the majority of stockholders present at a meeting called for the purpose. U. S. REV. STAT., 1878, § 5122. The present act permits a voluntary petition, but provides no form of corporate action. 36 U. S. STAT. AT LARGE, Sess. II. c. 412, § 3. Directors have power to commit acts of bankruptcy. Thus the weight of authority permits them to make a general assignment for the benefit of creditors. *Rogers v. Pell*, 154 N. Y. 518, 49 N. E. 75; *Birmingham Drug Co. v. Freeman*, 15 Tex. Civ. App. 451, 39 S. W. 626. But *cf. Abbot v. American Hard Rubber Co.*, 33 Barb. (N. Y.) 578. Directors may commit a preference. *Dana v. Bank of the United States*, 5 Watts & S. (Pa.) 223. And they may apply for a receiver. *Exploration Mercantile Co. v. Hardware & Steel Co.*, 177 Fed. 825. They may also make a written admission of the corporation's inability to pay debts and willingness to be adjudged a bankrupt. *In re Lisk Mfg. Co.*, 167 Fed. 411. *Contra, In re Bates Machine Co.*, 91 Fed. 625. Nor is this an ineffectual act of bankruptcy when the directors solicit a petition by creditors. *In re Moench & Sons Co.*, 123 Fed. 965. So the step taken by the principal case seems inevitable. *Contra, Donly v. Holmwood*, 4 Ont. App. 555. Objection on the ground that directors may thus effect a fundamental change should have been taken to the doctrine of general assignment. *Bank Commissioners v. Bank of Brest*, Har. (Mich.) 106. See *Beaston v. Farmers' Bank of Delaware*, 12 Pet. (U. S.) 102, 138. *Contra, Town v. President, etc. of Bank of River Raisin*, 2 Doug. (Mich.) 530. Moreover, it should be noted that the Act of 1867, requiring a vote of the stockholders, did not allow the corporation a discharge, whereas the present act does. *In re Marshall Paper Co.*, 102 Fed. 872.

DAMAGES — MEASURE OF DAMAGES — EFFECT OF NOTICE OF SPECIAL CIRCUMSTANCES AFTER DELIVERY OF GOODS TO CARRIER. — The defendant undertook to carry a printing press by rail to the residence of the plaintiff. Part of it was delivered, and the plaintiff thereupon gave notice of special damages he would suffer if the remainder was not promptly delivered. The plaintiff brought suit for the special damages alleged to have accrued from delay after the notice was given. *Held*, that such special damages cannot be recovered. *Hassler v. Gulf, C. & S. F. Ry. Co.*, 142 S. W. 629 (Tex., Ct. Civ. App.).

Unless notice of special circumstances be given to the carrier, damages for delay are limited to those which both parties may reasonably be supposed to

have contemplated at the time of making the contract as a probable result of the breach. *Hadley v. Baxendale*, 9 Exch. 341; *Swift River Co. v. Fitchburg R. Co.*, 169 Mass. 326, 47 N. E. 1015. But if such notice be given, the carrier is liable for special damages. *Illinois Central R. Co. v. Byrne*, 205 Ill. 9, 68 N. E. 720; *Gledhill Wall Paper Co. v. Baltimore & Ohio R. Co.*, 119 N. Y. Supp. 623. This rule holds even though the carrier must charge the same rate. *Chicago, etc. Ry. Co. v. Planters' Gin and Oil Co.*, 88 Ark. 77, 113 S. W. 352. If the carrier is notified after the goods have arrived at their destination and delays delivery, he is liable for the loss suffered. *Bourland v. Choctaw, etc. Ry. Co.*, 99 Tex. 407, 90 S. W. 483. Since the carrier is forbidden by law to refuse the goods, impose special rates, or stipulate against liability, the only reason for requiring notice is that he may know of the emergency in time to exercise the higher degree of care which the situation demands; and for this purpose notice a reasonable time before the delay has occurred should be as effective as notice at the time of making the contract. But the authorities hold otherwise. *Missouri, etc. Ry. Co. v. Belcher*, 89 Tex. 428, 35 S. W. 6; *Bradley v. Chicago, etc. Ry. Co.*, 94 Wis. 44, 68 N. W. 410.

ELECTRIC WIRES — APPLICATION OF THE PRINCIPLE OF FLETCHER v. RYLANDS. — The plaintiff company maintained telegraph lines and electrical appliances on a private right of way and on the highway. The defendant company operated on its adjacent private right of way an electric railroad whose currents interfered with the plaintiff company's lines. The plaintiff sought to enjoin the operation of the railroad unless devices to prevent the interference were installed. *Held*, that an injunction will not be granted. *Postal Tel. & Cable Co. v. Chicago, L. S. & S. B. Ry. Co.*, 97 N. E. 20 (Ind.).

For a discussion of the principles involved, see 24 HARV. L. REV. 322.

EMINENT DOMAIN — NATURE OF THE RIGHT OF EMINENT DOMAIN — REMOVAL OF DAM FOR PUBLIC HEALTH. — A statute declared that where a mill had become useless and so remained without repair for five years, the privilege should cease, as against the public health, convenience, and welfare, and that commissioners, wherever they deemed it conducive to those objects, might, without compensation, cause the dam to be removed, and the watercourse cleaned out and improved. *Held*, that the statute is unconstitutional. *Kiser v. Board of Commissioners of Logan County*, 97 N. E. 52 (Oh.). See NOTES, p. 551.

EMINENT DOMAIN — WHAT PROPERTY MAY BE TAKEN — PROPERTY ALREADY DEVOTED TO PUBLIC USE. — A city, under a general power, attempted to condemn land already appropriated to the use of a public library, in order to widen a street. It did not appear what part of the library's land the city desired to expropriate. *Held*, that the property cannot be taken under a general power. *City of Moliné v. Greene*, 96 N. E. 911 (Ill.).

Property may generally be taken by eminent domain from one public use and subjected to another. *City of Boston v. Inhabitants of Brookline*, 156 Mass. 172, 30 N. E. 611; *Matter of Petition of New York, etc. Ry. Co.*, 99 N. Y. 12, 1 N. E. 27. But such change of ownership is not allowed where there is no change in the use or its manner of exercise. *Suburban R. Co. v. Metropolitan West Side Elevated R. Co.*, 193 Ill. 217, 61 N. E. 1090. Nor is it permissible where the prior use would be thereby materially impaired or destroyed, unless such legislative intent appears expressly or by necessary implication. *Evergreen Cemetery Association v. City of New Haven*, 43 Conn. 234. Conversely, property not essential or already in actual use may be recondemned under a general power. *Railroad Co. v. Village of Belle Centre*, 48 Oh. St. 273, 27 N. E. 464. Some courts have gone to a considerable length in allowing such expropriation. *Butte, etc. Ry. Co. v. Montana Union Ry. Co.*, 16 Mont. 504, 41 Pac. 232;

Wheeling Bridge Co. v. Wheeling & Belmont Bridge Co., 34 W. Va. 155, 11 S. E. 1009. Thus one court has allowed a railroad station platform to be taken for a street under a general power. *State, New York & Long Branch R. Co. v. Drummond*, 46 N. J. L. 644. While another has reached the same result with respect to a school lot, although the use was somewhat impaired. *Inhabitants of Easthampton v. County Commissioners of Hampshire*, 154 Mass. 424, 28 N. E. 298. In view of such decisions it would seem that a contrary conclusion might well have resulted from a further consideration of the facts in the principal case.

ESTOPPEL — ESTOPPEL IN PAIS — WHETHER SOVEREIGN MAY BE ESTOPPED. — By an avulsion the state acquired whatever right it had to the land in controversy. The plaintiff subsequently held for over twenty years. During this time the state acquiesced in the plaintiff's possession as owner, and the plaintiff made costly improvements and paid the taxes levied by the state. The state thereafter made its first claim to the land. *Held*, that the state is estopped from asserting its claim. *State of Iowa v. Carr*, 191 Fed. 257 (C. C. A., Eighth Circ.).

For a discussion of the principles involved, see 19 HARV. L. REV. 126.

EVIDENCE — HEARSAY — PROOF OF RACE OF WITNESS'S PARENTS. — The defendant was indicted under a statute for selling liquor to A., a half-breed Indian. A. was allowed to testify that his father was a Portuguese and his mother a full-blooded Indian. *Held*, that this is not error. *State v. Rackich*, 119 Pac. 843 (Wash.).

It is well settled that a witness may testify to his own age. *Commonwealth v. Stevenson*, 142 Mass. 466, 8 N. E. 341; *People v. Ratz*, 115 Cal. 132, 46 Pac. 915. While often such testimony is hearsay, strictly speaking, the courts have held it admissible, probably because the information derived from family talks, birthdays, and other sources amounts practically to knowledge of the fact. *State v. Miller*, 71 Kan. 200, 80 Pac. 51; *Loose v. State*, 120 Wis. 115, 97 N. W. 526. See 6 HARV. L. REV. 449. Where it is based on personal observation of events and circumstances of daily life, it is not technically hearsay. *State v. Marshall*, 137 Mo. 463, 39 S. W. 63. For the same practical reasons a witness is permitted to testify to the age of members of his family. *Hancock v. Supreme Council Catholic Benevolent Legion*, 69 N. J. L. 308, 55 Atl. 246. *Contra, Rogers v. De Bardeleben Coal & Iron Co.*, 97 Ala. 154, 12 So. 81. It is submitted that the same considerations apply to testimony as to race. It seems a preferable rule to admit it subject to the discretion of the court in determining adequacy of knowledge and means of observation, rather than to exclude it generally on the ground of hearsay. If it is not admissible as a statement of the witness's own knowledge, it could probably be admitted, under proper conditions, as a statement of the family reputation. See 2 WIGMORE, EVIDENCE, §§ 1500, 1502. But cf. *Wright v. Commonwealth*, 72 S. W. 340. And some courts have allowed it to be shown by proof of general reputation in the neighborhood. *Vaughan v. Phebe*, Mart. & Y. (Tenn.) 4; *Gilliand v. Board of Education*, 141 N. C. 482, 54 S. E. 413. See 2 WIGMORE, EVIDENCE, § 1605.

FRAUDULENT CONVEYANCES — RIGHTS OF CREDITORS — CONVEYANCE OF PARTNERSHIP BUSINESS FRAUDULENT AS TO CREDITORS OF ONE PARTNER. — The business of a partnership composed of two members was by them conveyed to the defendant corporation with intent to defeat the creditors of one of the partners, who afterwards was adjudicated a bankrupt. The fraudulent nature of the conveyance was known to all the parties to it. *Held*, that the conveyance may be set aside by the trustee of the bankrupt partner. *Trustee of Gonville v. Patent Caramel Co.*, 105 L. T. 831 (Eng., K. B. D. in Bankruptcy, Nov. 14, 1911).

A conveyance made with intent to defraud creditors to one having notice is voidable by the creditors. *STAT. 13 ELIZ. c. 5.* The fact that the debtor joins with a solvent person in making the conveyance does not render it immune from attack. *Campbell v. Davis*, 85 Ala. 56, 4 So. 140. But though voidable by creditors, the conveyance is otherwise valid. So it has been held that the grantee is entitled to any surplus remaining after the satisfaction of the claims of the creditors. *Burich v. Elliott*, 3 Ind. 99; *Allen v. Trustees of Ashley School Fund*, 102 Mass. 262. And a conveyance by co-tenants has been held voidable only as to the share of the co-tenant whose creditors it was intended to defeat. *Campbell v. Davis, supra.* In England a partnership is not recognized by the law as an entity distinct from the members composing it; the partners are, collectively, the firm. See *POLLOCK, LAW OF PARTNERSHIP*, 6 ed., 20-21. In the principal case, then, the conveyance should be treated as voidable except in so far as it conveyed the interest of the non-bankrupt partner. This interest should remain in the grantee.

HUSBAND AND WIFE — RIGHTS OF HUSBAND AGAINST WIFE AND IN HER PROPERTY — RIGHT OF HUSBAND TO ALIMONY APART FROM DIVORCE PROCEEDINGS. — The plaintiff, being indigent and unable to support himself, prayed for a decree requiring his wife, who owned considerable property, to pay him alimony. *Held*, that the decree be granted. *Hagert v. Hagert*, 133 N. W. 1035 (N. D.). See *NOTES*, p. 556.

INTERSTATE COMMERCE — CONTROL BY CONGRESS — EMPLOYER'S LIABILITY FOR DEATH. — A locomotive fireman, while engaged in interstate commerce in New York, was killed through the negligence of the railroad company. His widow, as administratrix, sued the company under the Federal Employers' Liability Act, and accepted the defendant's offer of judgment. The intestate's father claimed one-half of the amount recovered under the New York Statute of Distribution. *Held*, that he is entitled to it. *Matter of Taylor*, 204 N. Y. 135.

The majority of the court hold that in so far as the federal act attempts to give an action for death to the administratrix it is unconstitutional, on the ground that Congress's power to regulate interstate commerce with respect to any particular employee must end with his death. That Congress has the power to regulate the liability of master to servant in interstate commerce can no longer be denied. *Mondou v. New York, N. H. & H. R. Co.*, 32 Sup. Ct. 169. The denial, in the Safety Appliance Act, of the assumption of risk doctrine has been held to apply to an action for death. *Mobile, J. & K. C. R. Co. v. Bromberg*, 141 Ala. 258, 37 So. 395. There the power of Congress has certainly been effective beyond the death of the employee. If Congress can render the railroad liable at all it must be able to specify to whom. Liability for injuries not causing death, and no liability for fatal ones, would be a singular result. At all events, inasmuch as the original recovery was under the federal statute, the distribution should be under it also. *Matter of Degaramo*, 86 Hun (N. Y.) 390, 33 N. Y. Supp. 502. See *Dennick v. Railroad Co.*, 103 U. S. 11, 20.

INTERSTATE COMMERCE — CONTROL BY CONGRESS — FEDERAL EMPLOYERS' LIABILITY ACT OF 1908. — The Federal Employers' Liability Act of April 22, 1908, provides that "every common carrier by railroad, while engaging in commerce between any of the states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . ." *Held*, that the statute is constitutional, though it applies to the negligence of employees not engaged in interstate commerce. *Second Employers' Liability Cases*, 223 U. S. 1, 32 Sup. Ct. 169. See *NOTES*, p. 548.

INTERSTATE COMMERCE — WHAT CONSTITUTES INTERSTATE COMMERCE — CONSIGNEE ACTING AS PRINCIPAL IN MAKING DELIVERIES. — The plaintiff took orders for automobiles in a restricted selling district in Pennsylvania, receiving cash deposits, which it remitted to the manufacturer in New York. On paying drafts for the balance of the list price, less a discount, the plaintiff received automobiles consigned to it from the factory and delivered them to the purchasers on receipt of payment. The plaintiff was taxed on these sales under a Pennsylvania statute. *Held*, that the tax is not invalid as a restraint on interstate commerce. *Banker Brothers Co. v. Commonwealth of Pennsylvania*, 32 Sup. Ct. 38.

In 24 HARV. L. REV. 324, it was submitted that the original-package doctrine only furnishes one test of whether a shipment is terminated. In this case the court properly makes that the important question and decides it by finding that the consignee acted as a principal in making deliveries and not as the agent in a continuous shipment.

JUDGMENTS — COLLATERAL ATTACK — PRESUMPTION OF JURISDICTION WHERE SERVICE IS BY PUBLICATION. — In an action to quiet title to land the defendant set up a sheriff's deed under a decree of foreclosure against the plaintiff's grantor, who was a non-resident. Except for a recital in the decree that due notice of the action was given the defendants, the record failed to show any service of summons or service by publication. *Held*, that the decree is not a bar to the plaintiff's action. *Duval v. Johnson*, 133 N. W. 1125 (Neb.).

Where the record shows want of jurisdiction on its face, a judgment may be attacked collaterally. *O'Malley v. Fricke*, 104 Wis. 280, 80 N. W. 436. Where the record does not affirmatively show lack of jurisdiction, there will ordinarily be at least a presumption in favor of the validity of a judgment of a court of general jurisdiction. *Gulickson v. Bodkin*, 78 Minn. 33, 80 N. W. 783. It has, however, been held that where there is service by publication the record must affirmatively show that the statute authorizing service by publication has been complied with; since this is a method of acquiring jurisdiction not in accordance with common-law proceedings. *Galpin v. Page*, 18 Wall. (U. S.) 350; *Furgeson v. Jones*, 17 Or. 204, 20 Pac. 842. There seems to be no reason on principle why the presumption with regard to the validity of a judgment of a court of general jurisdiction should vary with the method of service. This distinction has not met with general favor. *Hahn v. Kelly*, 34 Cal. 391; *Adams v. Cowles*, 95 Mo. 501, 8 S. W. 711. And the Supreme Court of the United States, which decided the leading case in support of the distinction, has since practically refused to follow it. *Applegate v. Lexington, etc. Mining Co.*, 117 U. S. 255, 6 Sup. Ct. 742.

LIBEL AND SLANDER — DAMAGES — MITIGATION OF DAMAGES; TRUTH OF PART OF ARTICLE NOT DECLARED ON. — Defendant published an article charging plaintiff with inhuman treatment towards his wife and also adultery. The complaint set up only the part referring to the adultery. The defendant set up in answer the entire article and offered to prove the truth of the part alleging cruelty. *Held*, that such a defense is properly pleaded in mitigation of damages. *Osterheld v. Star Co.*, 146 N. Y. App. Div. 388, 131 N. Y. Supp. 247.

The plaintiff's specific acts of misconduct may not be shown to reduce damages for a libel. *Scott v. Sampson*, 8 Q. B. D. 491. Two reasons for the decision in the principal case suggest themselves. First, when injury to reputation exists, injury to feelings is also considered as deserving redress. Logically, only the suffering caused by social opprobrium merits compensation; but this distinction has not been made, and anguish due to the insult's direct effect is included. *Rea v. Harrington*, 58 Vt. 181, 2 Atl. 475; *Zeliff v. Jennings*, 61 Tex. 458. But see 1 WIGMORE, EVIDENCE, § 209. In actions for indecent assault

and analogous actions, where this last is an element of damage, specific acts may be admitted to show that the plaintiff could not have been much offended. *Gulerette v. McKinley*, 27 Hun (N. Y.) 320. See 1 WIGMORE, EVIDENCE, §§ 210-213. *Contra, Gore v. Curtis*, 81 Me. 403, 17 Atl. 314. This reasoning has been applied to a libel on chastity. *Smith v. Matthews*, 21 N. Y. Misc. 150, 47 N. Y. Supp. 96. But in all these cases of offended virtue the specific conduct shown was impropriety; and the extension to collateral matters in the principal case appears dangerous. *Cf. Barton v. Bruley*, 119 Wis. 326, 96 N. W. 815. However, the case seems correct on the ground that where, as in New York, exemplary damages are allowed, truth of some statements in a libel should be admissible to rebut malice. *Contra, Fisher v. Patterson*, 14 Oh. 418. This has been held in the indistinguishable case where a separable part only of the libel declared on was submitted to the jury. *Holmes v. Jones*, 147 N. Y. 59, 41 N. E. 409. But *cf. Gressman v. Morning Journal Association*, 197 N. Y. 474, 90 N. E. 1131.

LIENS — LOSS OF LIEN BY REMOVAL OF FIXTURES. — The defendant purchased a house and lot with notice of a vendor's lien thereon, and removed the house to another lot owned by the defendant, without the knowledge of the lienholder. *Held*, that the lienholder may foreclose on the house. *Bowden v. Bridgman*, 141 S. W. 1043 (Tex., Ct. Civ. App.).

Wrongfully attaching a chattel of another to realty has been held by some courts not to divest the title to the chattel at law. *McDaniel v. Lipp*, 41 Neb. 713, 60 N. W. 81; *Eisenhauer v. Quinn*, 36 Mont. 368, 93 Pac. 38. But by the orthodox view the owner of the realty acquires legal title to the fixture. *Peirce v. Goddard*, 22 Pick. (Mass.) 559. The tortfeasor may sue only for damages. *Reese v. Jared*, 15 Ind. 142. The holder of a lien on a chattel would have no greater right that the lien be preserved at law. *Clark v. Reyburn*, 1 Kan. 281. But in equity the tortfeasor should not profit by his wrongful act. *Dakota Land & Trust Co. v. Parmelee*, 5 S. D. 341, 58 N. W. 811. All authorities agree that the lienholder may enjoin the removal of fixtures. *Williams v. Chicago Exhibition Co.*, 188 Ill. 19, 58 N. E. 611. If the fixture is simply removed without the knowledge or consent of the lienholder, the lien should not be destroyed. *Turner v. Mebane*, 110 N. C. 413, 14 S. E. 974. See *Hutchins v. King*, 1 Wall. (U. S.) 53, 60. *Contra, Buckout v. Swift*, 27 Cal. 433. Even when the removed fixture is annexed to other realty, the lien should not be lost as against anyone having notice or not paying value. *Hamlin v. Parsons*, 12 Minn. 108; *Partridge v. Hemenway*, 89 Mich. 454, 50 N. W. 1084. But relief has been denied when the lienholder did not show that the remaining security was inadequate. *Harris v. Bannon*, 78 Ky. 568. Following the view that the preservation of the lien is an equitable matter, it is not enforceable against a *bond fide* purchaser. *Verner v. Betz*, 46 N. J. Eq. 256, 19 Atl. 206.

LIMITATION OF ACTIONS — NATURE AND CONSTRUCTION OF STATUTE — OPERATION AGAINST PERSON UNDER DISABILITY. — While the plaintiff was an infant the defendant occupied his land adversely for seven years, the period of the statute of limitations. The defendant then abandoned it, but subsequently regained possession. The plaintiff became of age and instituted ejectment after the three years allowed by the statute for bringing suit after removal of disabilities, but within seven years after the defendant regained possession. *Held*, that the action is barred by the statute. *Dewey v. Sewanee Fuel & Iron Co.*, 191 Fed. 450 (Circ. Ct., M. D. Tenn.).

The language of many cases is that the statute does not run against disabled parties. See *Little v. Downing*, 37 N. H. 355, 368; *Fowler v. Pritchard*, 148 Ala. 261, 271, 41 So. 667, 670. Others more accurately say that the statute

operates, although its period is extended by the saving clause in their favor. See *Bunce v. Wolcott*, 2 Conn. 27, 33; *Herff v. Griggs*, 121 Ind. 471, 476, 23 N. E. 279, 281. For disabilities acquired after disseisin are ineffectual. *Kelley v. Gallup*, 67 Minn. 169, 69 N. W. 812. Cf. *McDonald v. Hovey*, 110 U. S. 619, 4 Sup. Ct. 142. And the heir, though disabled, takes subject to the time run against the ancestor, disabled or not. *Pim v. City of St. Louis*, 122 Mo. 654, 27 S. W. 525; *Davis v. Coblens*, 174 U. S. 719, 19 Sup. Ct. 832. It is generally held that possession, unimpeachable when the statute bars entry and action, is title. *Inhabitants of School District v. Benson*, 31 Me. 381; *Sharon v. Tucker*, 144 U. S. 533, 12 Sup. Ct. 720. But an infant, even after the period for an adult has run, retains a right of action, and until this is barred, the disseisor under the usual statute would have no lawful title. Consequently, his abandonment would necessitate the running of the statute *de novo*. *Overand v. Menczer*, 83 Tex. 122, 18 S. W. 301; *Old South Society v. Wainwright*, 156 Mass. 115, 30 N. E. 476. The statute here, however, expressly gave the disseisor title after seven years. SHANNON, CODE OF TENN., 1896, § 4456. This may be construed to operate against disabled parties. *Schauble v. Schulz*, 137 Fed. 389. Cf. *Jones v. Lemon*, 26 W. Va. 629, 635. The decision reconciles this with the provision for infants by letting title pass, subject to be defeated by action within three years after majority. Then abandonment after seven years is immaterial.

MALICIOUS PROSECUTION — PROBABLE CAUSE — ACQUITTAL OF PLAINTIFF AS EVIDENCE. — In an action for malicious prosecution the court refused to charge that if the plaintiff was tried and acquitted this lifted from him the burden of showing want of probable cause. *Held*, that this charge should have been given. *Hanchey v. Brunson*, 56 So. 971 (Ala.).

Lack of probable cause is an essential part of the plaintiff's case in malicious prosecution. *Abrath v. North Eastern Ry. Co.*, 11 Q. B. D. 440. Since it is the duty of an examining magistrate to hold an accused for trial if there appears to be probable cause for the prosecution, many courts hold that the discharge of the plaintiff by a magistrate is *prima facie* evidence of want of probable cause. *Barhight v. Tammany*, 158 Pa. St. 545, 28 Atl. 135; *Vinal v. Core*, 18 W. Va. 1, 42, 69, 70. Other courts hold that such a discharge has no bearing on the question of probable cause. *Israel v. Brooks*, 23 Ill. 575; *Davis v. McMillan*, 142 Mich. 391, 105 N. W. 862. However this may be, an acquittal shows merely that the accused was not believed, beyond a reasonable doubt, to be guilty, and has no logical bearing whatever on the question whether the defendant, at an earlier time, had reasonable grounds for prosecuting him. It is therefore almost universally held that an acquittal is no evidence — certainly not *prima facie* evidence — of want of probable cause. *Boeger v. Langenberg*, 97 Mo. 390, 11 S. W. 223; *Cullen v. Hanisch*, 114 Wis. 24, 89 N. W. 900. The contrary decisions are almost negligible. *Whitwell v. Westbrook*, 40 Miss. 311. See *Lunsford v. Dietrich*, 93 Ala. 565, 570, 9 So. 308, 310. The burden which the doctrine of the principal case lays upon prosecutors is likely unduly to discourage prosecutions.

MUNICIPAL CORPORATIONS — LIABILITY FOR TORTS — NEGLIGENT MAINTENANCE OF LAND CONDEMNED FOR PARK AFTER STATUTE AUTHORIZING SALE. — A statute authorized the sale of land acquired by a city for a public park. Before it was sold, the plaintiff was injured upon the land, and sued the city for negligence. *Held*, that the city is not liable. *Durkin v. City of New York*, 146 N. Y. App. Div. 472, 131 N. Y. Supp. 275.

The authorities are in conflict regarding the liability of municipalities for negligence in maintaining public parks. *Clark v. Inhabitants of Waltham*, 128 Mass. 567; *City of Denver v. Spencer*, 34 Colo. 270, 82 Pac. 590. The difficulty

is in classifying properly the public and private functions of a municipal corporation. See *Esberg Cigar Co. v. City of Portland*, 34 Or. 282, 288, 55 Pac. 961, 962. The court in the principal case, assuming that a city generally is responsible for unsafe conditions in parks, reasons that the statute, in authorizing a sale, dissolved the public trust, and thereafter the city had the liabilities of a private landowner. It is submitted that the liability of a city depends, not upon the purposes for which land is acquired, but upon its actual use. Thus where land is purchased for future public use, before it is devoted to that purpose, the city has only the private owner's liability. *Birch v. City of New York*, 190 N. Y. 397, 83 N. E. 51; *Barthold v. City of Philadelphia*, 154 Pa. St. 109. So if the land in the principal case was never used for a park, the city never got beyond the private landowner's responsibility, and the reasoning is inapplicable. If the land was used for park purposes, and continued to be so used to the time of the injury in question, it is difficult to see how a statute giving a power of sale would change the extent of liability.

MUNICIPAL CORPORATIONS — POLICE POWER AND REGULATIONS — ACTS PROHIBITED BY BOTH STATUTE AND ORDINANCE. — By its charter a city was given authority to make ordinances to regulate the sale of food. An ordinance was passed imposing fines for the sale of adulterated food. A state law was then passed, imposing a larger penalty for the same act. Subsequently a law reaffirmed the city's original power. *Held*, that the city can recover a fine under the ordinance for the sale of adulterated food. *City of Chicago v. Union Ice Cream Mfg. Co.*, 96 N. E. 872 (Ill.).

Originally municipal ordinances did not extend to criminal matters, and the penalty for violation was recoverable in an action of debt. See 2 DILLON, MUNICIPAL CORPORATIONS, 5 ed., §§ 634, 635. A municipality may now if authorized further penalize what is already a criminal act. *People v. Hanrahan*, 75 Mich. 611, 42 N. W. 1124. As to its power to do so, when not express, decisions are in chaotic conflict. *Matter of Sic*, 73 Cal. 142, 14 Pac. 405; *City of Seattle v. MacDonald*, 47 Wash. 298, 91 Pac. 952. The customary test of a municipal ordinance is reasonable necessity. *State, Cape May, etc. R. Co. v. City of Cape May*, 59 N. J. L. 404, 36 Atl. 696. If the state has already taken care of a matter, this may well raise a presumption against the reasonableness of the city's act. *Cf.* 2 DILLON, MUNICIPAL CORPORATIONS, 5 ed., §§ 632, 633; 2 MCQUILLIN, MUNICIPAL CORPORATIONS, §§ 876, 877. When the proceeding is in the form of a complaint in the name of the city, and not an action of debt, it still is not a criminal action and the constitutional guaranties as to criminal trials do not apply. *State v. Muir*, 164 Mo. 610, 65 S. W. 285; *Williams v. City Council of Augusta*, 4 Ga. 509. *Contra, State ex rel. Hamilton v. Municipal Court of Milwaukee*, 89 Wis. 358, 61 N. W. 1100. But if the action is in the name of the state and the penalty is imposed for the purpose of punishment, it is criminal. *State v. Kernan*, 57 Conn. 286. See 15 HARV. L. REV. 660. The ordinance must of course never be inconsistent with the state law. *Horn v. Chicago & N. W. Ry. Co.*, 38 Wis. 463. Imposing a smaller penalty does not make it inconsistent. *City of New Orleans v. Collins*, 52 La. Ann. 973, 27 So. 532.

PUBLIC SERVICE COMPANIES — RIGHTS AND DUTIES — TELEPHONE CONNECTIONS WITH OTHER LINES. — The plaintiff telephone company sued to compel the defendant telephone company to make an electrical connection between the two systems. By an operating agreement, the defendant company had made such connection with another telephone company. *Held*, that the bill should be dismissed. *Home Tel. Co. v. People's Tel. & Tel. Co.*, 141 S. W. 845 (Tenn.).

For a discussion of the principles involved, see 23 HARV. L. REV. 54.

SALES — CONDITIONAL SALES — CONDITIONAL SALE OF GOODS TO DEALER TO BECOME PART OF HIS STOCK IN TRADE. — A vendor sold goods to a retail dealer under a contract which provided that the title should remain in the vendor until the price should be paid. It was contemplated, however, that the goods might be sold in the course of the vendee's business as part of his regular stock in trade. The vendee mortgaged the whole stock to secure a loan made without notice of the contract. *Held*, that the reservation of title by the vendor is ineffective as against the mortgagee. *Mishawaka Woolen Mfg. Co. v. Westveer*, 191 Fed. 465 (C. C. A., Sixth Circ.).

Where goods are sold under a conditional sale but are to become part of the buyer's stock in trade, a *bonâ fide* purchaser for value is held to acquire title as against the seller. *Winchester Wagon Works & Mfg. Co. v. Carman*, 109 Ind. 31, 9 N. E. 707; *Spooner v. Cummings*, 151 Mass. 313, 23 N. E. 839. But *cf. Sargent v. Metcalf*, 5 Gray (Mass.) 306. Many courts have also held this reservation of title ineffective as to creditors, either on the view, as taken in the principal case, that such a reservation was wholly inconsistent with the other terms of the contract, or that it should be presumed to be fraudulent as to creditors. *Pontiac Buggy Co. v. Skinner*, 158 Fed. 858; *Ludden v. Hazen*, 31 Barb. (N. Y.) 650. Such a contract is sometimes considered, however, as merely conferring the power of an agent upon the buyer to pass title directly to the purchaser. *Fitzgerald v. Fuller*, 19 Hun (N. Y.) 180. The cases which hold that neither creditors nor those who purchase otherwise than in the regular course of trade can retain title as against the seller would seem consistent with this view. *Lewis v. McCabe*, 49 Conn. 141; *Burbank v. Crooker*, 7 Gray (Mass.) 158. The preferable view, however, by which the same result as that in the principal case would be attained, would seem to be that the seller is estopped as to all persons, creditors and purchasers alike, who may have acted on the faith of the buyer's having title. See *Spooner v. Cummings*, 151 Mass. 313, 316, 23 N. E. 839, 840; WILLISTON, SALES, § 329.

SALES — TITLE OF GOODS SUBJECT TO BILL OF LADING — CONCLUSIVENESS OF BILL OF LADING. — An exporting firm contracted to sell cotton to the defendants to be shipped during February, but having no cotton they forged bills of lading, and on transferring them obtained the purchase price from the defendants. In April they actually shipped the cotton to the defendants, taking bills of lading to themselves identical with the forgeries. Shortly afterwards they became bankrupt, and the plaintiff, their trustee, obtaining the bills, stopped the cotton in transit. *Held*, that the title has passed to the defendants, because the intent to appropriate is clear in spite of the form of the bill of lading, and the assent of the defendants to the late shipment is presumed since they are creditors. *Lovell v. Newman*, not yet reported (C. C. A., Fifth Circ.).

If the bill of lading here held by the buyers was issued by the railroad in advance of actual shipment, it would become a valid bill upon such shipment. *The Idaho*, 93 U. S. 575; *Rowley v. Bigelow*, 12 Pick. (Mass.) 307. For the carrier contracts with the shipper to deliver to the holder of that bill of lading. No interest in the *res* remains in the shipper because his intention to appropriate finally to the buyer is clear. The principal case differs from this only in form. True, the forged bills can acquire no validity, and a *bonâ fide* purchaser of the new bill would get the cotton. *Pollard v. Reardon*, 65 Fed. 848. But as between the parties a clear intent to appropriate rebuts the form of the bill of lading. *The Carlos F. Roses*, 177 U. S. 655, 20 Sup. Ct. 803; *Bailey v. Hudson River R. Co.*, 49 N. Y. 70. The situation is similar to that when the legal title to the goods is reserved for purposes of security, and the buyer has the risk of loss and something in the nature of an equitable title to the property. *Mirabita v. Imperial Ottoman Bank*, 3 Ex. D. 164. See *Wilson Grain Co. v. Central National Bank*, 139 S. W. 996, 999 (Tex.); *Walter v. Ross*, 2 Wash. C. C. (U. S.)

283, 289; *WILLISTON, SALES*, §§ 284, 305. It makes no difference that here the shipper's purpose is to defraud third persons. For a discussion of the presumption of assent to the late shipment, see *NOTES*, p. 555.

STATUTE OF FRAUDS — PART PERFORMANCE — MUTUAL WILLS. — A husband and wife orally contracted that all their property should go to the survivor. Shortly thereafter each made a will leaving all property to the other. Four days before his death, the husband, without the knowledge or consent of the wife, made a new will leaving real property to the defendants. *Held*, that the contract is specifically enforceable. *Brown v. Webster*, 134 N. W. 185 (Neb.).

A contract to devise is specifically enforceable against heirs, devisees, or grantees. *Smith v. Yocum*, 110 Ill. 142; *Croft v. Layton*, 68 Conn. 91, 35 Atl. 783; *Parsell v. Stryker*, 41 N. Y. 480. However, an oral contract to devise realty will not be enforced in the absence of sufficient part performance to take the contract out of the Statute of Frauds. *Harder v. Harder*, 2 Sandf. Ch. (N. Y.) 17; *Weeks v. Lund*, 69 N. H. 78, 45 Atl. 249. The mere making of mutual wills has been held insufficient part performance. *Hale v. Hale*, 90 Va. 728, 19 S. E. 739. This has been so held on the ground that the survivor has not changed his position by such performance. *Gould v. Mansfield*, 103 Mass. 408; *Stone v. Hoskins*, [1905] P. 194. One case holds the contrary view, declaring that the survivor has undergone a risk for which money damages would be inadequate compensation. *Turnipseed v. Sirrine*, 57 S. C. 559, 35 S. E. 757. This view, it is submitted, is the better, and on this ground the principal case seems correct if the will is clearly referable to the contract, which, it is submitted, is questionable. Further, it has been held, in accord with the principal case, that subsequently executed mutual wills, though not referring to the contract, are in themselves a sufficient memorandum under the statute. *Shroyer v. Smith*, 204 Pa. St. 310, 54 Atl. 24. However, the opposite view seems preferable. *Hale v. Hale*, *supra*.

TRUSTS — POWERS AND OBLIGATIONS OF TRUSTEES — RIGHT OF TRUSTEE WITH LIFE INTEREST IN RES TO PROFITS FROM UNAUTHORIZED INVESTMENTS. — A trustee who was also life tenant of the *res* expended part of the fund in unauthorized investments and received thereby a larger income than could have been gained from authorized securities. *Held*, that the remainderman cannot recover the excess of income from the trustee's estate. *In re Hoyles*, [1912] 1 Ch. 67.

It has been held that a trustee making unauthorized investments and paying increased profits to the tenant for life is discharged from liability if the original fund is paid undiminished to the remainderman. *Slade v. Chaine*, [1908] 1 Ch. 522. But *cf.* *Dimes v. Scott*, 4 Russ. 195; *In re Hill*, 50 L. J. Ch. 551. Such a question, however, is in its essentials a controversy as to the rights of the two *cestui que trust*, and does not involve the question of any profit arising to the trustee. It is an elementary proposition that a trustee should not make a profit out of his office. See *LEWIN, TRUSTS*, 12 ed., 306. When his breach of trust works evident damage to the *cestui*, it is clear that he must make reparation. *Wightwick v. Lord*, 6 H. L. Cas. 217. In the principal case the trustee has taken an unauthorized risk in respect to the trust *res* and has paid the increased compensation gained thereby to himself as life tenant. By his dual relation to the *res* he has gained a profit at the risk of the remainderman. As a practical result the decision allows a trustee to make a profit out of his position.

WILLS — CONSTRUCTION — "ISSUE" HELD TO MEAN "DESCENDANTS." — A will contained a devise to A. for life, and after his decease, leaving a wife

surviving, to her for life, then to A.'s issue. *Held*, that the last gift is too remote. *Taylor v. Blake*, [1912] 1 I. R. 1.

A gift to a class to be determined at the death of an unascertained wife is too remote, as the wife may not be *in esse* at the time of the gift. If in the present case "issue" were construed to mean "children," the gift would be good, as the class would be determined on A.'s death. But the case adopts the English rule of construction that "issue" *primâ facie* means "descendants." *Leigh v. Norbury*, 13 Ves. Jr. 340. Chancellor Kent and Judge Redfield believed the primary meaning of the word was "children." See 4 KENT, COMM., *278, note; 2 REDFIELD, WILLS, 1 ed., 357, note. A few states have adopted their view. *Thomas v. Levering*, 73 Md. 451, 21 Atl. 367. See *Brisbin v. Huntington*, 128 Ia. 166, 173, 103 N. W. 144, 147. The modern tendency is to allow slight circumstances to change the meaning to "children." *Palmer v. Horn*, 84 N. Y. 516; *Shalters v. Ladd*, 141 Pa. St. 349, 21 Atl. 596. But even states that have been most liberal in this adhere to the English rule as to the *primâ facie* meaning, where there are no modifying circumstances. *Schmidt v. Jewett*, 195 N. Y. 486, 88 N. E. 1110. The principal case is right in holding that the rule against perpetuities cannot affect the construction. See GRAY, RULE AGAINST PERPETUITIES, 2 ed., § 629. Two American cases construe "issue" as "descendants" even though this results in a perpetuity. *Estate of Cavarly*, 119 Cal. 406, 51 Pac. 629; *Bartlett v. Sears*, 81 Conn. 34, 70 Atl. 33.

WILLS — CONSTRUCTION — PARTICULAR WORDS: "IN CASE OF DEATH." — A. devised realty and personalty to his wife for life, and after her death to his eight children, and in case of the death of one or more of the children, their share or shares to be equally divided between the survivors. All the children survived the testator; one died before the widow; the widow died. *Held*, that the heir and personal representative of the deceased child are entitled to his share. *Re Poulney*, 56 Sol. J. 252 (Eng., Ch. D., Jan. 19, 1912).

Where, after an absolute gift, there is a gift over in the event of the death of the legatee, questions of construction arise. Death, which is certain, is spoken of as contingent. If the gift is an immediate gift to A., and if he dies, then to B., it means death in the testator's lifetime. *Hinckley v. Simmons*, 4 Ves. Jr. 160; *Whitney v. Whitney*, 45 N. H. 311; *Fowler v. Ingersoll*, 127 N. Y. 472, 28 N. E. 471. If the gift is future, as in the principal case, it might mean either dying before the testator or before the period of vesting in possession. By the weight of authority, it is taken to mean the latter. *Hervey v. M'Laughlin*, 1 Price 264; *Beatty's Admr. v. Montgomery's Executrix*, 21 N. J. Eq. 324. *Contra*, *Johnes v. Beers*, 57 Conn. 295, 18 Atl. 100. It is said that the testator is not presumed to have contemplated the event of the legatee's dying before himself. See *Green v. Barrow*, 10 Hare 459, 461. This is, of course, only a rule of construction. *Milner v. Milner*, 34 Beav. 276. See 1 WILLIAMS, EXECUTORS, 10 ed., 1007. Even as such its soundness is questionable, for it is inconsistent with the tendency to avoid a construction which would divest an estate. *In re Cobbold*, [1903] 2 Ch. 299. It is submitted that more satisfactory results will be reached if courts, as in the principal case, construe each particular will unhampered by a rule of construction.

WILLS — CONSTRUCTION — TAKING PER STIRPES OR PER CAPITA. — The testator devised land to A. for life and at her death, provided she died without issue, to be equally divided between "the bodily heirs" of X. and Y. The probate court construed the will as giving a half interest to the bodily heirs of X. and a half interest to the bodily heirs of Y. *Held*, that this is error, since all the children should take in equal parts. *Taylor v. Cribbs*, 56 So. 952 (Ala.).

In the absence of any intention to the contrary on the face of the will, the general rule is that all take *per capita* rather than *per stirpes* under a gift to the

children of several persons. See 2 JARMAN, WILLS, 6 ed., 1711. This is true where the gift is to the children of X. and Y. in equal shares. *Armitage v. Williams*, 27 Beav. 346; *Budd v. Haines*, 52 N. J. Eq. 488, 29 Atl. 170. So also where it is to the children of X. and the children of Y. *Lady Lincoln v. Pelham*, 10 Ves. Jr. 166; *Britton v. Miller*, 63 N. C. 268. A gift to X. and Y. and their children is treated in the same way. *Cunningham v. Murray*, 1 De G. & Sm. 366. And so is a gift to a class and their children. See *Almand v. Whitaker*, 113 Ga. 889, 890, 39 S.E. 395. "Bodily heirs" as used in the principal case must mean children. Where words importing equal division are used, as in the principal case, a presumption is raised in favor of giving *per capita*. *In re Stone*, [1895] 2 Ch. 196, 201; *Kling v. Schnellbecker*, 107 Ia. 636, 638, 78 N. W. 673. This presumption, however, yields to very slight evidence of a different intention in the context of the will. See *Scott's Estate*, 163 Pa. St. 165, 169; 2 JARMAN, WILLS, 6 ed., 1712. Had the gift in the principal case been substitutional, *i. e.*, to several persons or their children, a different result would have been reached. *Congreve v. Palmer*, 16 Beav. 435. See *Kling v. Schnellbecker*, 107 Ia. 636, 639, 78 N. W. 673, 674.

WITNESSES — PRIVILEGE AGAINST SELF-INCRIMINATION — USE IN EVIDENCE OF BANKRUPT'S BOOKS IN POSSESSION OF TRUSTEE. — The defendant's books were taken over by a receiver and afterwards by a trustee in bankruptcy. They were used against him without his knowledge in subsequent proceedings before the grand jury. *Held*, that the defendant's constitutional right not to be compelled to be a witness against himself was not violated. *United States v. Halstead*, 40 Wash. L. Rep. 23 (D. C., Ct. App., Jan. 2, 1912).

The constitutional sanction of the common-law privilege against self-incrimination forbids compelling a person to act affirmatively in furnishing evidence against himself. See 4 WIGMORE, EVIDENCE, §§ 2252, 2263, 2264. The production of documents under a *subpoena* or other process treating him as a witness may be refused. *Boyle v. Smithman*, 146 Pa. St. 255, 23 Atl. 397; *Lamson v. Boyden*, 160 Ill. 613, 43 N. E. 781. But articles obtained by search, whether legal or not, may be admitted in evidence without violating the privilege. *Gindrat v. People*, 138 Ill. 103, 27 N. E. 1085; *Adams v. New York*, 192 U. S. 585, 24 Sup. Ct. 372. But see *Boyd v. United States*, 116 U. S. 616, 633-635, 6 Sup. Ct. 524, 532-534. A bankrupt must deliver his account-books to a receiver, although they contain incriminating information. *Matter of Harris*, 221 U. S. 274, 31 Sup. Ct. 557. *Contra*, *In re Kanter*, 117 Fed. 356. And they may afterwards be used as evidence against him. *Kerrch v. United States*, 171 Fed. 366. But *cf.* *Blum v. State*, 94 Md. 375, 51 Atl. 26. Where, as in the principal case, the books have been delivered to a trustee, there is an additional reason for reaching the same result. The trustee is vested by operation of law with title to the bankrupt's property. BANKRUPTCY ACT OF 1898, § 70 a (1). See *In re Hess*, 134 Fed. 109, 111. Therefore, its use before the grand jury cannot be a violation of his constitutional rights. Thus, through the trustee as intermediary, a person may have to divulge information which cannot be got directly. But "that is one of the misfortunes of bankruptcy if it follows crime." See *Matter of Harris*, 221 U. S. 274, 279, 31 Sup. Ct. 557, 558.

BOOK REVIEWS.

CORRECTION. Attention is called to an error in the review of Chamberlayne on Evidence in the March issue. 25 HARV. L. REV. 483, 485. In the last line of page 485 "table of contents" should read "table of cases."

THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND. Edited by H. A. L. Fisher. In three volumes. Cambridge: The University Press; New York: G. P. Putnam's Sons. 1911. pp. ix, 497; 496; vi, 528.

The fifteen hundred or more pages of these three volumes contain sixty-eight papers of various kinds written between 1875 and 1906. They vary in length and subject matter from a book review of three or four pages, a brief note on some historical point from the English Historical Review or an appreciation of Lord Acton, to a college dissertation on Liberty and Equality of over one hundred and fifty pages, a bibliography of English legal history originally contributed to the Political Science Quarterly, a sketch of English legal history of over seventy-five pages which first appeared in Traill's Social England, a long essay "designed to explain to Germans the nature of a trust" published in Grünhut's Zeitschrift, or the careful papers on the History of the Register of Original Writs from this Review.

It is safe to assume that every lawyer who is even slightly acquainted with the historical foundations of our legal system already knows something of the contents of these three volumes. The larger that acquaintance, it is also safe to say, the greater will be his welcome of this opportunity, now first given, of having in convenient and inexpensive form these papers which have hitherto been accessible only to the favored few who possessed complete files of the Law Quarterly Review and the English Historical Review, and not all accessible even to these.

Much of Maitland's best work appeared in these papers and apparently none of importance which could be reasonably expected in a collection of this kind has been omitted from this one, unless it be the chapter on the Anglican Settlement and the Scottish Reformation in volume two of The Cambridge Modern History. The omission of Maitland's introductions to his volumes of the publications of The Selden Society and his remarkable introduction to the Parliament Roll of 1305 in the Rolls Series, the editor satisfactorily accounts for on the ground that they "could not without injury be wrenched from the texts which they are intended to introduce." In the case of the former of these there is the additional good reason that every one who is sufficiently interested in the subject to read them ought if possible to obtain them by enrolling himself as a member of the society itself, and thus help to further a project dear to Maitland's heart and likely to be in the coming years his principal memorial. With the exception of these we have in these volumes practically "the whole mass of Maitland's scattered writing."

Of these sixty-eight papers the editor has starred twenty-two as "of a less technical character" than the rest. The other forty-six have practically all to do with the law or its history, and this is also true of some of the twenty-two more popular ones. Among subjects such as The Origin of Uses, The Corporation Sole, The Origin of the Borough, The Seisin of Chattels, and The Law of Real Property, the breadth of Maitland's knowledge and interests is indicated

by a learned review of Liebermann's *Gesetze der Angelsachsen* and a paper on the making of the German Civil Code.

The problem of corporate personality in its history, nature and practical effects in our legal system was the centre of Maitland's investigation and interest in the last few years of his life. Under the influence of Gierke he became profoundly convinced of the truth of the theory of a real though incorporeal existence of the corporate person and of the corporate will, in opposition to the view that the corporation is merely a figment of the imagination, a creation out of nothing made by the State for purposes of convenience. Though this controversy has gone on for years on the Continent and now fills a library of books, these six papers, together with Maitland's brilliant introduction to his translation of Gierke's "Political Theories of the Middle Age" have virtually introduced the subject to English and American lawyers at large, and are likely to remain the classical exposition of it in English. To appreciate Maitland's influence in this respect one has only to compare the number of articles on this subject which have appeared in leading legal periodicals in England and America before and since he began to publish these papers. The timeliness of this subject and its intimate connection with some of the most pressing problems before our courts and our people, serve to illustrate the intensely practical character of all Maitland's aims and interests. However far back these papers may take us in the historical development of our legal doctrines, we always feel in reading them that in tracing the beginnings of that development our author has constantly in mind a better understanding of its end. Maitland has none of that foolish impatience with the study of our past development which renders superficial and worthless so much that is written to-day, but he never falls into the opposite error of mere legal antiquarianism.

It is unnecessary at this late day to try to give a critical estimate of these writings. That matter was settled long ago. Considering the fact that the series was begun thirty-five years ago, there is surprisingly little which must be revised in the light of later research. "He wrote little, perhaps nothing, in early manhood which he would have cancelled in later years." There will no doubt be a difference of opinion as to the correctness of a few of the conclusions. All may not be able, for example, to accept entirely the author's views on the origin of the borough; and many will be unable to see in the corporation as Maitland did, "no fiction, no symbol, no piece of State's machinery, no collective name for individuals, but a living organism and a real person, with body and members and a will of its own." Most of the papers, however, are on subjects not controversial; but even where they are, and in the rare cases where we cannot accept all their conclusions, our admiration for their value and suggestiveness is not one whit diminished. They are, as Mr. Fisher says of their author, "always learned, always original, and in ninety-nine cases out of a hundred . . . transparently right."

The papers are given in their original form without annotation. C. H. M.

THE LAW OF CONTRACTS. By Clarence D. Ashley. Boston: Little, Brown and Company. 1911. pp. xxviii, 310.

This little treatise on the Law of Contracts is an interesting book and an interesting kind of book. It is a thought which cannot fail to occur to every lawyer and especially to such lawyers as are compelled constantly to search for authoritative statements of the law, that before many years the mass of material will be so great as to paralyze the efforts of the most industrious. The American Digest and the Key Number System are useful, but when pertinent decisions

on a single point are numbered by hundreds, what can be done? The only answer to such an inquiry can be that lawyers must endeavor to seek the principles at the foundation of their science and rely chiefly on accurate reasoning from these principles rather than simply on an endeavor to find cases similar in facts to the one under consideration. But such a search for fundamental principles cannot mean an endeavor to memorize sundry brief formulæ, but rather an effort, through testing every proposition by applying it to a variety of facts, to discover how many of the general statements in law books are gold and how many are mere dross.

Dean Ashley, who has been himself an active practitioner and is now at the head of a large law school in the City of New York, where, if anywhere, it may be supposed the demand for the immediately practical is insistent, finds time to write a book (doubtless in large measure the reflection of his teaching) which makes slight pretense to any elaborate collection or consideration of American decisions, but is occupied almost wholly with a statement and discussion of the theoretical principles which must govern all decisions involving the law of contracts. It is this method which the author invariably pursues of seeking the sound and reasonable principle rather than merely stating what courts have decided that is the most interesting feature of the book.

In general the writer's conclusions and reasoning will commend themselves to the reader, and even in cases where an individual student of the subject may differ from Dean Ashley's conclusions, he will always recognize the force of his arguments. The book is written, moreover, in an attractive style and is singularly readable.

The author, both in his preface and elsewhere, makes the fullest acknowledgment to the work of Professor Langdell and other writers on the law of contracts. His acknowledgments are indeed so generous that a hasty reader might fail to give the author himself sufficient credit for the power of analysis and of statement which he shows.

. S. W.

THE LIABILITY OF RAILROADS TO INTERSTATE EMPLOYEES. By Phillip J. Doherty. Boston: Little, Brown and Company. 1911. pp. 371.

The last decade has witnessed in this country a marked tendency on the part of law makers to impose upon masters and hence, indirectly, upon society as a whole, a share of the burdens of industrial accidents hitherto, under common-law fictions, borne alone by workmen. It is for an interpretation of a remedial statute of this nature from what the author pleases to term the "humane," in contradistinction to the "property," point of view that this volume pleads. The particular statute under consideration is the Federal Employers' Liability Act of 1908. The work is in no wise a "text-book." Rather is it an aggressive and exhaustive "brief" urging (1) a broad and liberal interpretation of this Act, and (2) its constitutionality, being, in large measure, a reply to arguments advanced in a report of a committee appointed by a conference of railroad counsel at Atlantic City, N. J., in July, 1908, to consider questions arising under the Employers' Liability Acts. The contentions of the author as to the constitutionality of the Act of 1908 have recently been confirmed by the Supreme Court of the United States. *Second Employers' Liability Cases*, 223 U. S. 1, 32 Sup. Ct. 169. With the author's vigorous attack on the established but discredited common-law doctrines of fellow service and assumption of risk in his excellent second chapter, most readers will incline to agree, but the constant reiteration of hostility to these doctrines tends to become wearisome. Interesting originality is shown in the chapters considering "When

is a railroad engaged in interstate commerce?" and "What employees are engaged in interstate commerce?" and in the chapter supporting the proposition that "Congress may regulate the regulations between master and servant engaged in interstate commerce." The work as a whole, however, suffers from an excess of lengthy quotations and from a redundancy which suggests "padding."

R. T. S.

THE LAW OF EVIDENCE. By Sidney L. Phipson. Fifth Edition. London: Stevens and Haynes. 1911. pp. lxxix, 743.

In an earlier number (21 HARV. L. REV. 157) the fact was mentioned that Phipson on Evidence passed into its fourth lustrum of life coincidentally with its fourth edition. The distinction of bringing out a fifth edition by his own hand has come to the author after a still shorter interval, and the success which has made this possible is well deserved. Our notice of the fourth edition renders unnecessary any detailed reference to the many merits of the book, among which are its neat and compact style, the skilful variation of type and spacing as aids to the eye, the illustrative examples following each chapter, and the author's careful study of the literature of his subject, English and American, including (p. 49) editorial comment in this Review. Over five hundred new cases have been added to the present edition, together with references to recent statutes affecting the English law, and the text has evidently been revised with care.

E. R. T.

THE LAW OF CONTRACTS. By Clarence D. Ashley. Boston: Little, Brown and Company. 1911. pp. xxviii, 310.

THE LAW AND CUSTOM OF THE CONSTITUTION. By Sir William R. Anson, Bart. Vol. I, Parliament. Reissue revised. Fourth Edition. Oxford: The Clarendon Press; London, New York, Toronto: Henry Frowde. 1911. pp. xxvi, 404.

THE UNDERLYING PRINCIPLES OF MODERN LEGISLATION. By W. Jethro Brown. London: John Murray. 1912. pp. xx, 331.

THE LAW RELATING TO CONFLICTING USES OF ELECTRICITY AND ELECTROLYSIS. By George F. Deiser. Philadelphia: T. & J. W. Johnson Company. 1911. pp. xv, 138.

CLAIMS. FIXING THEIR VALUES. By George F. Deiser and Frederick W. Johnson. New York: McGraw-Hill Book Company. 1911. pp. ix, 158.

THE LAW OF PERSONAL INJURIES. Based on the Statutes and Decisions of the Supreme Court and of the Court of Appeals of Georgia. By John L. Hopkins. Second Edition. In two volumes. Atlanta: The Harrison Company. 1912. pp. xvi, 772; xv, 773-1542.

A DIGEST OF ENGLISH CIVIL LAW. By Edward Jenks. Book III: Law of Property. London: Butterworth & Company; Boston: The Boston Book Company. 1911. pp. xlii, 547-668, 9.

MASSACHUSETTS TRIAL EVIDENCE. By Edwin Gates Norman and Arthur Stillman Houghton. New York: Baker, Voorhis and Company. 1911. pp. ix, 1123.

THE LAW OF INTERSTATE COMMERCE AND ITS FEDERAL REGULATION. By Frederick N. Judson. Second Edition. Chicago: T. H. Flood and Company. 1912. pp. xxiv, 805.

FOUR PHASES OF AMERICAN DEVELOPMENT. By John Bassett Moore. Baltimore: The Johns Hopkins Press. 1912. pp. 218.

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THE STATUS OF TRADE UNIONS IN ENGLAND.

THE late Professor Maitland in his introduction to the translation of Gierke's *Political Theories of the Middle Ages* and in a number of lectures and papers¹ now conveniently accessible has familiarized English lawyers with the conception of the reality of corporate personality, and has shown how the institutions of English law (notably the trust) have made possible something like a corporate life in associations to which the formal recognition of corporations has not been accorded. I do not propose in what follows to discuss the validity of the realist conception, in support of which, following in Maitland's footsteps and by way of comment and illustration, I have said something elsewhere.² Nor is my title, "The Status of Trade Unions," intended to beg any question of ultimate jurisprudence, much less of metaphysics or psychology, but merely to denote an aggregate of phenomena, which, in their practical working, bear a remarkable resemblance to the status of legally recognized corporations.

The layman might expect that bodies so numerous, so permanent, and often so powerful as trade unions would have received the same formal recognition of their corporate character as has been conferred in one way or another on universities and colleges, on railway companies, and on the numerous trading bodies which we know

¹ Maitland, *Collected Papers*, iii, 210-270.

² *Legal Personality*, an inaugural lecture, 27 *L. Quart. Rev.* 90.

as limited companies. As a matter of fact for good or for ill this has not been done, and trade unions in substance remain in the class of what are called "voluntary" societies, — voluntary not because it is a matter of free choice whether a man will belong to such a society or not, for this may be equally true of membership of a corporation, but because its legal existence, so far as it has a legal existence, is the creation of the will, real or presumed, of its members and does not require the coöperation of any public authority.

It has come into existence simply because its members have agreed to associate; as soon as that agreement is lawfully ended, the association ceases to exist. Nothing beyond this agreement is necessary for its constitution; nothing beyond the lawful ending of the agreement is needed to put an end to the association. The acts of such an association are in the eye of the law the acts of its members, or at least of some of its members; its rights and liabilities are ultimately analysable in accepted legal theory into the rights and liabilities of individual persons.³ Thus there is no special law of associations in England. The law governing associations is in substance the general law of contract, of agency, and of property applied to aggregates of numerous individuals. There is not and never has been any general law forbidding, nor has any special law been needed to allow, persons to associate. Freedom of association has never been looked upon as a privilege requiring constitutional guarantees.

Generally speaking, whatever one man may lawfully do, two or more may lawfully do in concert or combination; and though it may be true⁴ that in certain cases combined conduct is illegal where the like acts done without combination would be lawful, any such rule against combination if it exists is not a rule relating

³ No analysis is capable of expressing the whole truth, and in the present case the analysis cannot be made even approximately adequate to the facts without the help of fictions, notably the fiction of countless contracts which have no existence in the minds of the members. The only escape from such fictions would be found in the frank recognition of the corporate personality of voluntary associations. But for my present purpose, I am content *stare super antiquas vias*.

⁴ As to the various views which have been held in England on the question of liability, civil or criminal, for conspiracy, see Erle, *Trade Unions* (1869); Wright, *Criminal Conspiracies* (1872); and the statements of Mr. Arthur Cohen and Sir Godfrey Lushington in the Report (1906) of the Royal Commission on Trade Disputes and Trade Combinations.

to associations as such, but applies just as much to the temporary combination of two persons, as to a permanent association of two hundred or twenty thousand. The law knows of no distinction of principle between the temporary agreement of a few and the permanent association of many.

Let us see now how the general law operates in its application to voluntary associations.

1. The law of contract.

An association may be regarded in the first instance as a contract between its members. Any two or more persons may enter into a contract for any lawful object. The promises contained in such a contract made by each member bind him to the performance of such promises, and each is entitled to claim such performance from the others. The terms of such a contract will be found in the rules of an association by which a member on entering agrees expressly or impliedly to be bound, and to the observance of which on the part of other members and of the officers of the society he is entitled.

A contract in general cannot be altered without the consent of everyone who is a party to it. If by the rules the subscription is fixed at a certain amount, a member cannot be forced, on pain of deprivation of membership, to pay an increased subscription.⁵ But since unanimity in a large body is difficult or impossible, the rules themselves will generally be so framed as to give to a majority, or to a specified majority, *e. g.*, two thirds, usually after compliance with some requirement of notice, a power of alteration. Such a power of alteration will then be a part of the original contract between the members, and every member will be bound by an alteration duly made in accordance with it.⁶

Regarded as a contract, then, the rules of a society are a set of promises made by each member to all the other members, or, where they relate specially to the functions of the society's officers, promises made by the officers to the members generally and by the members generally to the officers. Such a contract regulates the rights and duties of members to each other. Such contracts do not in themselves impose any liability on members towards strangers, or on strangers towards the members.

⁵ *Harington v. Sendall*, [1903] 1 Ch. 921.

⁶ *Thellusson v. Viscount Valentia*, [1907] 2 Ch. 1.

2. The principles of agency.

It is in the nature of things impossible that all the members of an association should directly take part in every act necessary for carrying out the purposes of the association, and they will therefore provide for the appointment of officers, usually themselves members of the society, for doing most of the acts necessary for these purposes. Such officers are in law agents, persons whose acts will operate to confer rights on the members of the society as against strangers, and rights upon strangers as against the members of the society. Their acts are in law the acts of the members. Nor is this attribution of the agent's acts to those for whom he acts a mere fiction of the law. Where liabilities are incurred by contract, *e. g.*, by the purchase of goods or the hire of services, in accordance with the authority conferred, there is no difficulty in seeing the substantial justice of holding those who have given the authority to be subject to the liability, nor is there any substantial injustice in holding that a similar liability arises where the agent is ostensibly clothed with an authority which is wider than that which has really been conferred. Where again the agent in the course or scope of his employment commits wrongful acts whether wilful or negligent against strangers, those who employ him will incur liability to make good the damage suffered: and the great breadth with which this rule has been generally employed in English law is not felt in ordinary cases to work any substantial injustice. In the case of associations the actual or ostensible authority of the agent or the scope or course of his employment will largely, at any rate, depend on the purposes of the association as declared in its rules.

3. The law of property, especially the law of trusts.

What is the legal position of the property of such a society? The law allows property to be owned not only by individuals separately, but also by two or more individuals as co-owners. Thus it is conceivable that the property of an association might directly be held by all the members as co-owners. But in practice such an arrangement would be found unworkable, for the legal forms of transfer are such that the necessary transfer of interests on the retirement of members and the entry of new members could not in practice be carried out. Thus it becomes necessary that the common property should be ostensibly in the hands of some

few individuals on behalf of the society and the members generally. The English law of trusts affords peculiar facilities for such an arrangement. Land and buildings, stocks and shares and money, may be vested in a small number of trustees, who as legal owners can deal with such property, take proceedings for its recovery and protection, and dispose of it to strangers, while the rights of the members in such property are a form of legally recognized, "equitable," beneficial ownership. Such equitable ownership of the members, however, is not a pure co-ownership. It is a co-ownership for the purposes and subject to the rules of the society, and the member's right is not a direct right to a share, but a right to participate in the benefits and control of the property as "social property."⁷ The member of a club, for instance, is not entitled as an ordinary co-owner would be to have the club property partitioned; he is only entitled to use it as club property.⁸

This possibility of subjecting property to a common purpose is restricted by the rule against perpetuities. Thus a bequest of property to a society in terms which provided that it should permanently, or for a period longer than the rule allows, be preserved intact as capital, would, unless the purposes of the society were charitable, be invalid. But there seems to be nothing objectionable in the holding of property by a society as an endowment in fact, so long as the society by its rules retains power at any time to deal with the capital at its pleasure.⁹

4. The application of the foregoing principles to the liability of societies, and their members, and of the social property.

On general principles the liability which persons incur for the acts of their agents is a direct liability of every such person, and is unlimited in amount, a rule well illustrated by the common law as to partnership. But in the case of associations for purposes other than those of individual profit, the principle is established, at any rate as regards contractual liabilities, that the authority conferred by the members on the agents of the society is not an

⁷ It seems convenient to use the phrase "social property" as meaning what is technically property held upon trust for the members of the society for the purposes and subject to the rules of the society, and is in effect the property of the society.

⁸ *In re St. James's Club*, 2 De G. M. & G. *383 (1852).

⁹ See *Carne v. Long*, 2 De G. F. & J. *75 (1860); *Cocks v. Manners*, L. R. 12 Eq. 574 (1871); *In re Clarke*, [1901] 2 Ch. 110; *In re Swain*, 24 T. L. R. 882 (1908).

authority to pledge the credit of each member generally, but only to the extent of the common property, and that persons dealing with the officers of such associations must be taken to know that they can look only to such common property for payment.¹⁰ In the case of liability for wrong, it seems that no attempt has ever been made to establish any wider liability of the members.¹¹ On the other hand, it is clear that within the ordinary limits of the liability of a principal for the acts of his agent, the social property will be liable whether for contract or wrong, through the medium of proceedings brought by the stranger against the members generally in what is called a "representative" action, a few prominent members being selected to represent all; or against the trustees in whom the common property is vested; or by proceedings brought by an officer who has been compelled to pay damages to a stranger, for an indemnity against the members and trustees. In this way the social property is treated in effect as being what it is in truth, — the property of a body distinct from its members. Further, it would seem that in practice and probably in principle the social property is not subject to the private liabilities of the members; *e. g.*, my share in the property of my club cannot be made available for payment of my private groceries bill.

I now proceed to deal specifically with the position of trade unions.

First, a trade union is in substance a voluntary society. The legislature in 1871 was unwilling to incorporate trade unions, and then as now trade unionists were almost unanimously opposed to

¹⁰ *In re St. James's Club*, *supra*; *Fleming v. Hector*, 2 M. & W. 172 (1836); *Wise v. Perpetual Trustee Co.*, [1903] A. C. 139.

¹¹ The committee of a political association acting within the general scope of their authority publish a pamphlet which contains a libel on A. Can it be supposed that A. could hold individual members liable without limit for payment of the damages which he may recover? If it is argued that the rules of the association which expressly or impliedly limit the liability of members to payment of their subscriptions are *res inter alios acta* which cannot limit A.'s rights, the answer is that the relation between the members and their executive is not like that of master and servant in which the master at every moment retains the power of controlling the servant's actions. There seems to be nothing to prevent the courts from holding that the agency in such a case is *sui generis*, analogous to the position of an independent contractor in involving no personal liability of the members, but differing from it in that the members have authorized the social property to be employed for certain purposes and have thereby rendered it liable for wrongs done in the course of effecting those purposes.

incorporation. This unwillingness was due largely to fear, on the one hand that incorporation would confer on them far larger powers than they would possess as voluntary societies, on the other that it would subject them to liabilities from which as voluntary societies they would be free. Both fears were largely based on a failure to appreciate the fact that the principles of contract, agency, and trust in reality place a voluntary society in a position which for practical purposes, both as regards powers and liabilities, is very little different from that of a corporation. It was this mistaken belief which caused trade unionists to regard the decision in the Taff Vale case¹² as an injustice, on the ground that it placed trade unions under liabilities from which the legislature by refusing incorporation had left them free. In substance that decision was nothing more than an application to trade unions of general principles which are applicable to all voluntary societies, and which might well be applied to such bodies as the Tariff Reform League or the Gladstone League.¹³

Secondly, trade unions before 1871 were commonly believed to be, and in many or most cases really were, illegal societies, on the ground that their purposes were in restraint of trade. The Trade Union Act of 1871 assumed that a trade union must be an illegal society in this sense by including in the statutory definition only combinations which at common law would be illegal on the ground of restraint of trade. As a matter of fact this belief in the necessary illegality of trade unions was also erroneous. The amending Act of 1876 removed common-law illegality from the statutory definition, and a fair number of recent cases, notably the second action brought by Mr. Osborne against the Amalgamated Society of Railway Servants,¹⁴ have shown that a very efficient trade union, fulfilling all the purposes for which trade unions exist, may be formed without incurring the taint of common-law illegality. The precise effect of the illegality of trade unions at common law, where it existed, was never determined. The following seems to be as complete a statement as is possible.

¹² Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants, [1901] A. C. 426.

¹³ The Times of March 6, 1912, publishes an opinion given by Sir Edward Clarke, K. C., to the effect that it would be possible by means of a representative action to render the funds of the Women's Social and Political Union liable for damage to property committed on behalf of that society.

¹⁴ Osborne v. Amalgamated Society of Railway Servants (No. 2), [1911] 1 Ch. 540.

At any rate since the repeal in 1824 of the older statutes against combinations, no person has ever been punished for mere membership of a trade union. The prosecution and punishment of trade unionists have always been for particular acts done in combination, in most cases amounting to offenses against statutes then in force, in a few doubtful cases offenses against the common law of conspiracy. In spite of some older *dicta* to the contrary, it seems now certain that mere membership of a trade union was never at common law a punishable offense.¹⁵

It seems clear that not only contracts directly in restraint of trade, *e. g.*, agreements not to work, but all contracts sufficiently closely connected with the illegal purposes of a trade union, *e. g.*, agreements to pay subscriptions to a union whose purposes were illegal, or agreements to provide benefits for members of such a union, would be void; and this would go far to make all the rules of such a trade union void and legally inoperative.

There seem to be no cases before 1871 of actions brought by or against trade unions in respect of the acts of the officers of the union, and it is a matter of mere speculation whether the illegality of the purposes of the union would have been a bar to such actions on either side.

The disabilities in respect of property involved in the illegal character of trade unions are also somewhat uncertain. It is substantially true that till shortly before 1871 a member of a trade union who misappropriated trade-union property could not be made criminally liable. But this was not primarily due to the illegality of a trade union, but to the common-law rule that the misappropriation of common property by a co-owner was not theft. This rule imposed a disability which trade unions shared with such respectable associations as business partnerships or the Young Men's Christian Association. Before this disability was removed a special procedure to prosecute for misappropriation was conferred by statute on friendly societies, and two decisions¹⁶ laid it down that the illegality of the purposes of a trade union prevented it from using this procedure. But as soon as the Larceny

¹⁵ *Dicta* of Crompton, J., in *Hilton v. Eckersley*, 6 E. & B. 47 (1855), dissented from in *Mogul S. S. Co. v. McGregor*, [1892] A. C. 25, 47, 58.

¹⁶ *Hornby v. Close*, L. R. 2 Q. B. 153 (1867); *Farrer v. Close*, L. R. 4 Q. B. 602 (1869).

Act of 1868 had removed the common-law rule as to co-owners, it was held (even before the passing of the Act of 1871) that a trade union could prosecute for misappropriation by one of its members.¹⁷

As to the civil position of trade-union property, it would seem that the illegality of the purposes of a trade union would make void any trust of property for those purposes. But it does not follow that such property was wholly at the mercy of the person who for the time being held it. On the contrary, it is submitted that such a person would hold it upon a resulting trust. He would hold it for the benefit of those whose contributions it represented, *i. e.*, the members individually, so that each individual member would be entitled to call for a return of his contribution, so far as it has not been employed for trade-union purposes.¹⁸ This would have put it in the power of dissentients to embarrass a union by taking proceedings for the division of the property, but would not have left the property destitute of all legal protection.

The Trade Union Act of 1871 dealt with the status of trade unions in the following way:

It made clear that the illegality of the purposes of a trade union should not be such as to involve any liability to punishment of members.¹⁹ Agreements and trusts for trade-union purposes were declared not to be void, and thus the agreements embodied in the rules of a trade union, and the trusts upon which property was held for trade-union purposes, became valid agreements and trusts, and except so far as the contrary was provided in the next section, with regard to agreements, all such agreements and trusts would be entitled to legal protection and direct enforcement in the courts.²⁰ It was declared that a number of specified agreements should not by reason of the passing of the Act become directly enforceable.²¹

¹⁷ *Regina v. Blackburn*, 11 Cox C. C. 157 (1868).

¹⁸ *Cf. Regina v. Tankard*, 17 Cox C. C. 719, [1894] 1 Q. B. 548; *In re Printers' etc. Society*, [1899] 2 Ch. 184.

¹⁹ 34 & 35 Vict. c. 31, § 2: "The purposes of any trade union shall not, by reason merely that they are in restraint of trade be deemed to be unlawful, so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise."

²⁰ *Id.*, § 3: "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust."

²¹ *Id.*, § 4: "Nothing in this Act shall enable any court to entertain any legal proceed-

The object of this provision was on the one hand to prevent a union from using legal proceedings for the purpose of controlling its members or outsiders, and on the other to prevent a union from being embarrassed by suits brought by members for payment of benefits or the like. But not only was it declared that nothing in the section should render any such agreement unlawful, but it is clear, both from the wording of the section and from subsequent cases, that it does not prevent proceedings from being taken for the enforcement of any such agreement, if proceedings could have been taken before the Act. Thus, for instance, in the case of a union whose purposes are not illegal at common law on the ground of restraint of trade, there is nothing to prevent a member of the union from suing for payment of benefits to which he is entitled under the society's rules. The whole of these provisions apply to all trade unions whether registered or unregistered, and there is nothing to require any trade union to be registered.

The subsequent provisions of the Act of 1871 (except the defining and repealing sections 23 and 24) relate to registered unions.²² Any seven or more members may, by subscribing their names to the rules of the union and otherwise complying with the provisions of the Act, register the union with the Registrar of Friendly Societies. The registration is, however, void if any of

ing instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely:—

- “(1) Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ or be employed;
 - “(2) Any agreement for the payment by any person of any subscription or penalty to a trade union;
 - “(3) Any agreement for the application of the funds of a trade union,
 - “(a) To provide benefits to members; or
 - “(b) To furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules or resolutions of such trade union; or
 - “(c) to discharge any fine imposed upon any person by sentence of a court of justice; or
 - “(4), Any agreement made between one trade union and another; or
 - “(5) Any bond to secure the performance of any of the above-mentioned agreements.
- “But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful.”

²² *Id.*, §§ 6-22.

the purposes of the union are unlawful;²³ *i. e.*, unlawful in some sense other than that of merely being illegal at common law on the ground of restraint of trade. The main object of providing for registration was to give some security for the proper conduct of the union by requiring annual returns to be made to the Registrar showing the financial position of the union, the changes made in the rules and the changes of officers, and in this way to protect the interests of the members. It confers some, but no very large, privileges on the union; nor does it, except in so far as there may be a difference in the application to registered and unregistered unions of the principle of *ultra vires*, impose restrictions on it.

"The Act of 1871, s. 6," says Lord Johnston in a Scotch case,²⁴ "provides for the registration of Trade Unions, but the registration is voluntary. I do not find that this registration confers any privileges on the Union. What it does is rather to place it under certain regulations intended mainly for the protection of its own members. If it imposes any restrictions they are incidental merely. It certainly does not incorporate the Union or give it the status of a registered Company, or even of a Friendly Society. As I read it, its object and effect was to secure to the workman that if he does join a registered Trade Union, he may rely on its affairs and in particular its finance being conducted with some claims to regularity and soundness."

This *dictum*, though substantially true, is too sweeping. The following actual, though not very considerable, privileges are enjoyed by registered unions: (1) Summary proceedings for the recovery of moneys withheld or misappropriated by officers and members;²⁵ (2) Avoidance of expense in the transfer of the union's property on a change of trustees, and in the appointment of trustees;²⁶ (3) Exemption of provident funds from income tax.²⁷

The legislature possibly thought that in providing for the vesting of the property of registered unions in trustees it conferred a special power of holding property on registered unions which unregistered unions would not enjoy. But as a matter of fact, as soon as the illegality attaching to trade unions on the ground of restraint of trade was removed by the earlier section which applies to all trade

²³ *Id.*, § 6.

²⁴ Mackendrick v. Nat. Union of Dock Labourers, 48 Scot. L. R. 17 (1910).

²⁵ Act of 1871, § 12.

²⁶ Act of 1871, § 8; Act of 1876 (39 & 40 Vict. c. 22), § 4.

²⁷ Trade Union Provident Funds Act, 1893 (56 Vict. c. 2).

unions, the capacity to hold property through the medium of trustees followed as a matter of course, under the general law of trusts.

A question has, however, been raised with regard to the holding of land. The Act ²⁸ expressly provides that a registered union may purchase or take on lease in the names of the trustees any land not exceeding one acre, and it is thought by some that outside this power no trade union can hold or acquire land.²⁹ Thus an unregistered union cannot hold land at all, a registered union cannot hold land exceeding one acre, nor acquire land otherwise than by purchase or lease. I would submit that this view is incorrect. There is nothing to prevent land as well as other property being held by trustees for any lawful voluntary society so long as the rule against perpetuities is not infringed; *i. e.*, property must not be held, whether under the terms of the conveyance, or bequest, or under the rules of the society as a permanent endowment of which the capital cannot be expended. Subject to this rule no special power of holding land is needed. Further, a trade union is not a charity, and therefore the provisions of the statutes relating to charitable uses which formerly made void gifts of land by will for charitable purposes, and which still impose formalities on dispositions *inter vivos* for such purposes, and in most cases require land given by will for charitable purposes to be sold within one year from the death, have no application. Land is commonly held by trustees for the benefit and the purposes of a golf club or cricket club, without any incorporation or any special privilege, and there seems to be no reason for putting trade unions in a different position from other lawful voluntary societies. The decision in *In re Amos, Carrier v. Price*,³⁰ in which it was decided that a gift of land by will was void as not falling within the Act of 1871 (which only refers to a *purchase* or *lease*) may be a correct decision on one of the grounds given for it by the Judge, namely, that the bequest upon the proper construction of the will involved a perpetuity, *i. e.*, a permanent capital endowment; but it is submitted that it is not a sound authority for the view that it is impossible for an unregistered union to hold land, or for a registered union to ac-

²⁸ Act of 1871, § 7.

²⁹ Schloesser and Smith Clark, *The Legal Position of Trade Unions*, 50 (1911). Cf. Greenwood, *The Law Relating to Trade Unions*, 167 (1911).

³⁰ [1891] 3 Ch. 159.

quire land otherwise than in accordance with section 7 of the Act of 1871.

Three questions relating to the position of trade unions which have been the subject of numerous and important decisions, and in one case have led to a remarkable piece of legislation, deserve special treatment.

1. The limitations imposed by section 4 of the Act of 1871 on the enforcement of trade-union contracts. This is a question which has arisen mainly in connection with claims by members to benefits.

The section does not make unenforceable any contract which would have been enforceable at common law. It merely prevents direct enforceability from following from the legalization of contracts which would otherwise have been unlawful as being in restraint of trade. It is therefore necessary in the first instance to inquire in each case whether there is anything in the rules of the union which would have been unlawful on this ground at common law. On this question the courts have to some extent fluctuated, and it is impossible to lay down a perfectly clear test as to what is and what is not an illegal rule in restraint of trade. But in substance it seems that the following distinction is sound: When members of a union are required under penalties to abstain from entering into employment on specified conditions, *e. g.*, taking piece work or taking work under conditions which the trade-union rules declare to be unfair; or to cease work whenever called upon to do so by a committee, such a rule is at common law illegal.³¹ On the other hand, a rule merely providing that men going on strike for specified reasons, or after receiving the approval of a committee shall be entitled to strike pay, is not. Strikes are not illegal, nor is it illegal to provide for the maintenance of men on strike.³²

Even if it is ascertained that some of the rules of the society are illegal at common law, it does not follow that other rules, which are not in themselves open to the objection of illegality, are unenforceable. The question is whether the legal and the illegal rules are so connected as to be inseparable. Whether they are separable or not is a question to be determined in each case. In general one

³¹ *Russell v. Amalgamated Society of Carpenters*, [1910] 1 K. B. 506.

³² *Swaine v. Wilson*, 24 Q. B. D. 252 (1889); *Gozney v. Bristol Trade and Provident Society*, [1909] 1 K. B. 901.

may say that where the strike funds and the benefit funds are not kept separate, where the main object of the society is a restraint of trade, and where the rules provide for a forfeiture of benefits in the event of a member refusing to comply with illegal trade rules, the rules relating to benefits cannot be separated, and all are equally unenforceable.³³

The Act only prohibits the *direct* enforcement of contracts. It thus prohibits, where it applies, any claim for payment of benefits. But since the contracts contained in the rules, and the trusts upon which property is held for the purposes of the society, are made lawful and valid by the Act, there is no objection to any proceedings which will indirectly have the effect of tending to the observance of the rules and the application of the property for the purposes of the rules. In *Wolfe v. Matthews*,³⁴ members of an unregistered society sought an injunction to restrain other members from applying part of the funds in carrying out an amalgamation with another society. It was objected that the action was barred by section 4 of the Act. In overruling the objection Fry, J., said:

"It is plain that this is not an action to recover damages for breach of an agreement, neither is it, in my judgment an action directly to enforce an agreement, which proceedings are alone mentioned in the fourth section. An order that the defendants should pay money to the plaintiffs would be a direct enforcement of an agreement for the application of the funds, but all that is sought here is to prevent the payment of the moneys to somebody else. Either that is no enforcement of an agreement at all, or it is an indirect enforcement."

Similarly, in *Yorkshire Miners' Association v. Howden*³⁵ the House of Lords held that a member of a trade union was entitled to restrain the union from applying funds in giving strike pay contrary to the rules of the association.³⁶ Further, the Court of Appeal has recently held, in *Osborne v. Amalgamated Society of Railway Servants*

³³ Contrast *Russell v. Amalgamated Society of Carpenters*, *supra*, and *Mudd v. General Union of Carpenters*, 26 T. L. R. 518 (1910), with the cases cited in the last note and with *Osborne v. Amalgamated Society of Railway Servants* (No. 2), [1911] 1 Ch. 540. Some of the *dicta* seem to go so far as to make all the rules unenforceable in the case of any union of which the main object involves an illegal restraint of trade, even though individual rules taken by themselves may be unobjectionable.

³⁴ 21 Ch. D. 194 (1882).

³⁵ [1905] A. C. 256.

³⁶ *Cf. Cope v. Crossingham*, [1909] 2 Ch. 159.

(No. 2),³⁷ that even if the objects of a union are illegal at common law a member who has been unjustly expelled contrary to the rules is entitled to be reinstated. The contract of membership is not one of those which the Act declares to be unenforceable, and since membership does not entitle a member to enforce the contract to pay benefits to him, it follows that to declare him a member is not an enforcement of the contract for benefits.

It is a serious question whether any useful purpose is served by maintaining the unenforceability of the contracts for benefits. In practice the only cases where that section has been held applicable have been cases where a member claimed benefits which the union refused to pay, and we have had the curious spectacle of a trade union relying upon its own illegality at common law as a means of evading its obligations to its members. The section has in effect made the union as against its members a judge without appeal in its own cause, and has thus strengthened the control which the executive has over the members. Nor is it really in the interests of trade unionism that a man should feel that in joining a union he puts himself at the mercy of the possible tyranny or bad faith of those who are at the head of the organization.

The contracts, other than those to provide benefits, enumerated in section 4 of the Act appear not to have formed the subject of litigation. But it is well worth considering whether at any rate agreements between one trade union and another ought not to be made enforceable. Recent events have made it plain that one great obstacle in the settlement of trade disputes is the difficulty of obtaining the complete observance on one side or the other of the terms agreed upon. The observance rests only on the good faith of the parties, and a union has not the overpowering motive of liability for non-observance to induce it to do all in its power to secure the compliance of all its branches and members with what has been agreed upon. The only penalty for failure to observe the compact is a renewal of the dispute by a fresh strike or lockout. I believe that the principle of collective bargaining would be strengthened if agreements between unions of masters and men were backed by legal sanction.

Contracts for furnishing contributions to employers or workmen not members of the union in consideration of compliance with rules

³⁷ [1911] 1 Ch. 540.

or resolutions of the union are also declared unenforceable. Contracts of this kind appear not to be common, and no practical question arises with regard to them, but there seems to be no objection in principle to rendering them enforceable. The only case in which it seems right to maintain the rule of unenforceability is that of contracts for the discharge of fines imposed by a court of justice.

2. The liability of trade unions for wrongful acts committed on their behalf.

The liability of unions and their funds (apart from recent legislation) follows from the general principles of agency applied to voluntary societies, and independently of any special status conferred on registered unions is enforceable by means of a representative action. The existence and extent of the agency is, of course, a matter of fact, so long, at any rate, as the acts done are within the purposes for which the union legally exists. Two points as to the extent of this liability may be noted. First, it has been settled by the House of Lords that the branches of a union and the branch officers are not necessarily agents of the union, and that the rules of a union may well be such as to secure the union from liability for their wrongful acts.³⁸ This decision goes a long way to prevent an unfair or oppressive application of the rule of the principal's liability for the acts of his agent. Secondly, the application to trade unions of the doctrine of *ultra vires* in the Osborne case suggests a doubt whether acts done in pursuance of purposes in fact authorized by the rules of the union, but not included in the purposes recognized in the Trade Union Acts, would subject the union to any liability. In *Linaker v. Pilcher*³⁹ it was held that the funds of a union were liable for a libel contained in a newspaper conducted on behalf of the union. The judge in that case took the view that the carrying on of a newspaper was within the powers of a trade union. In the Osborne case,⁴⁰ Farwell, L. J., denied the correctness of the decision, partly, it would seem, on the ground that the carrying on of a newspaper is not within the lawful powers of a trade union. It may, however, be doubted whether the doctrine of *ultra vires* has any application to tortious acts. Certainly in the case of a corporation

³⁸ *Denaby and Cadeby Collieries v. Yorkshire Miners Association*, [1906] A. C. 384.

³⁹ 84 L. T. 421, 70 L. J. K. B. 396, 17 T. L. R. 256 (1901).

⁴⁰ *Osborne v. Amalgamated Society of Railway Servants* (No. 1), [1909] 1 Ch. 163, 193.

it has recently been held that it is no defense to allege that the wrongful act was not within the lawful powers of the corporation.⁴¹

The decision in the Taff Vale case,⁴² in which the funds of a union were held liable, and its officers restrained by injunction, in respect of acts done in pursuance of a trade dispute, for the first time applied a quasi-corporate liability to trade unions. This liability in truth followed from general principles applicable to all voluntary societies, but it was taken by trade unionists as a piece of judicial legislation overriding the decision of the legislature, which had refused to incorporate trade unions. Not only do I think the decision right in principle, but in the particular case it cannot be said to have involved any injustice to the union; for the acts complained of were largely acts of violence, which no system of law ought to allow to be committed with impunity. But, taken in conjunction with other decisions, such as that in *Quinn v. Leatham*,⁴³ it threatened to paralyse all trade-union action which could be said to fall under the heading of unlawful combination or interference with trade, even action of the most peaceable kind. The result was that two questions which ought to have been kept distinct were confused: First, what classes of conduct ought to be treated as wrongful in individuals or combinations? Secondly, ought trade unions as bodies to be exempt from liability for wrongful conduct? The Trade Disputes Act of 1906, not content with establishing, rightly in my opinion, that conduct in contemplation or furtherance of a trade dispute ought not, if otherwise lawful, to involve any liability merely because it consists of acts done in combination, or amounts to an interference with trade, went further, and by section 4 removed all quasi-corporate liability from trade unions for any tortious acts whatsoever, at any rate if done in contemplation or furtherance of a trade dispute.⁴⁴

⁴¹ *Campbell v. Mayor, etc., of Paddington*, [1911] 1 K. B. 869.

⁴² *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants*, [1901] A. C. 426. The liability established in this case, of a registered union to be sued in its registered name, is as pointed out by Lord Lindley (at p. 444) a matter of form and not of substance. It is difficult to understand why some of the judges (*e. g.* Farwell, J., in [1901] 1 K. B. 170) should speak of the union's capacity to own property and to act by agents as giving it some of the essential qualities of a corporation in any sense in which this is not equally true of every lawful voluntary society.

⁴³ [1901] A. C. 495.

⁴⁴ Trade Disputes Act, 1906 (6 Edw. 7, c. 47), § 4:

"(1) An action against a trade union whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other mem-

It follows that at the present day the funds of a union cannot be made liable even for acts of violence, or for such wrongs as libel and deceit committed on behalf of the union, provided that those acts are done in contemplation or furtherance of a trade dispute. Nor (it would seem) do negligent acts done under the like circumstances involve the union funds in liability.

The limits of this exemption from liability must, however, be noticed: First, It is clear that the liability of individuals is in no way affected. All that is prohibited is an action against the union as such, or against members of the union as representing the whole body of the union. An officer or member of the union who himself commits tortious acts, or authorizes their commission, is still personally liable.⁴⁵ Secondly, It is not clear how far the exemption extends to acts not done in contemplation or furtherance of a trade dispute. The first part of section 4 is perfectly general, and contains no words referring to trade disputes. But subsection (2) provides that nothing in the section shall affect the liability of the trustees of a trade union to be sued in the events provided for by the Trade Union Act of 1871, section 9, except in respect of any tortious act committed by or on behalf of the union in contemplation or in furtherance of a trade dispute.

Now section 9 of the Trade Union Act of 1871, which in terms refers only to the trustees of a registered union, provides that the trustees may sue and be sued in any action "touching or concerning" the property of the union. It may be thought that this only refers to proceedings directly relating to the property of the union, *e. g.*, proceedings for a nuisance caused by the union premises being employed to the annoyance of neighbors, or being allowed to fall into dangerous disrepair. As a matter of fact, both before and since the Act of 1906 actions have been allowed against the

bers of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court.

"(2) Nothing in this section shall affect the liability of the trustees of a trade union to be sued in the events provided for by the Trade-Union Act 1871 section nine, except in respect of any tortious act committed by or on behalf of the union in contemplation or furtherance of a trade dispute."

It has been suggested that this section would not prevent the bringing of an action for an injunction in respect of a tortious act alleged to be threatened, but not committed.

⁴⁵ *Bussy v. Amalgamated Society of Railway Servants*, 24 T. L. R. 437 (1908).

trustees of a union in order to make the union property liable for acts of a very different kind. In *Linaker v. Pilcher* ⁴⁶ an action was successfully brought against the trustees of a union for a libel published in the *Railway Review*, a periodical owned and published by the society, and registered as a newspaper in the names of the trustees. The action was brought at a time when the Court of Appeal had decided in the *Taff Vale* case that a trade union as such could not be sued, and before that decision had been reversed by the House of Lords. The law was, therefore, in substance supposed to be such as it has since been made by the Trade Disputes Act of 1906.

In *Rickards v. Bartram* ⁴⁷ (after the Act of 1906) it was again held that the union funds could be made liable for a libel published in a newspaper on behalf of the union, the registered proprietors, who were presumably the trustees of the union, being made defendants, and the libel not being published in furtherance or contemplation of a trade dispute.

It is true that in *Bussy v. Amalgamated Society of Railway Servants* ⁴⁸ the union funds were held not liable, but here it does not appear that the union trustees were parties.

Upon the whole I think that subsection (2) does to a very considerable extent preserve the liability of trade-union funds for wrongful acts committed on behalf of the union and unconnected with trade disputes. But the law must be considered as doubtful and unsatisfactory, until we have decisions of a higher court on several questions:

(a) Were *Linaker v. Pilcher* and *Rickards v. Bartram* right in deciding that trade-union funds could be made liable by means of an action against the trustees for a wrong connected with the property of the union only in so far as it consisted of a libel published in a newspaper registered in the names of the trustees?

(b) Can the principle be extended so as to cover cases where there is not even so much connection between the wrong and the union property, *e. g.*, for malicious prosecution undertaken on behalf of the union?

(c) Are any similar proceedings possible, in spite of the Trade

⁴⁶ 84 L. T. 421, 70 L. J. K. B. 396, 17 T. L. R. 256 (1901).

⁴⁷ 25 T. L. R. 181 (1908).

⁴⁸ 24 T. L. R. 437 (1908).

Disputes Act of 1906, against the trustees of an unregistered union? ⁴⁹

3. The Osborne decision ⁵⁰ and the doctrine of *ultra vires*.

We here enter upon an aspect of trade-union law, which, unlike the topics hitherto discussed, is not explicable solely by reference to the principles of contract, agency, and trust which go to make up the structure of voluntary societies. So far as the principle of *ultra vires* is applicable to trade unions their status is not merely that of voluntary societies, but a status governed by the specific provisions of the Trade Union Acts. To a voluntary society that principle has, properly speaking, no application. In the case of a voluntary society it is no doubt true that acts done by the society or its officers and applications of the funds of the society, which are not in accordance with its rules, are not binding upon the members, and may be restrained by injunction at the suit of complaining members; but in such cases we have merely to deal with breaches of contract or of trust. There is no incapacity on the part of the society or of its members as a body to pursue certain activities, provided the rules as originally framed or as subsequently duly altered authorize such activities. Nor is there anything to prevent such rules from authorizing at the same time the most diverse activities, provided such activities are in themselves lawful; *e. g.*, to combine the promotion of political objects with social intercourse and amusement or the pursuit of profit. But the decision in the Osborne case is clear, that the pursuit of political objects in combination with the ordinary trade-union purposes is, at least, in the case of a registered trade union, *ultra vires*, and that the rules of such a trade union cannot be framed so as lawfully to confer the power to pursue such purposes. As Lord Macnaghten says,

"A rule which purports to confer such a power as that now in question on any Trade Union registered under the Act of 1871, whether it

⁴⁹ In *Vacher and Sons Ltd. v. London Society of Compositors*, *The Times*, March 26, 1912, it was argued in the Court of Appeal that subsection 4 (2) enables an action for tort (not committed in contemplation or furtherance of a trade dispute) to be maintained against a trade union, even without making the trustees parties. The court reserved judgment.

⁵⁰ *Amalgamated Society of Railway Servants v. Osborne* (No. 1), [1909] 1 Ch. 163, [1910] A. C. 87.

be an original rule of the Union or a rule subsequently introduced by amendment, must be *ultra vires* and illegal."

So far as the decision in the Osborne case is based on the doctrine of *ultra vires*, and it is this doctrine which formed the basis of the *ratio decidendi* in which all the members of the Court of Appeal and the majority of the House of Lords concurred, it has nothing to do with any doctrine of public policy under which the particular application of funds to the support of "pledge-bound" members of Parliament might be considered objectionable, or with the principle asserted by Farwell, L. J., that the requirement of contributions for such purposes was an interference with the political liberty of the members. On the one hand, either of the latter grounds of objection, if correct, would apply equally to any other society, and even to transactions between persons not related to each other as members of a society. On the other hand, the rule that a trade union as such cannot apply its funds or require contributions for political purposes is based solely on the limitation of purposes imposed by the Acts of 1871 and 1876, which, by the defining section, as construed by the courts, confine the objects of a trade union to the two objects of trade regulation and the provision of benefits for members. The rule thus equally prohibits trade unions from applying their funds to any other purposes whatsoever, however non-political or otherwise unobjectionable; *e. g.*, contributions for the furtherance of education among the working classes. A Scotch court has, as a logical consequence of the Osborne decision, even restrained a trade union from paying the expenses of a delegate to the Trade Union Congress.

Does the principle of *ultra vires* as laid down in the Osborne decision apply to all trade unions or only to registered unions? The defendants in the Osborne case are a registered union, and the case cannot be taken as a decision with regard to unregistered unions. Among the judgments given, those of Cozens-Hardy, M. R., Farwell, L. J., Lord Macnaghten, and Lord Atkinson clearly go upon the footing that a registered union by accepting registration has acquired a peculiar status which subjects it to the rule of *ultra vires*. On the other hand, the judgment of Lord Halsbury seems to be based on a view that the mere legalization of trade unions by the Act of 1871 was a privilege which carries with it a restriction of the purposes which may lawfully be pursued. As regards later cases Lord Sker-

rington in the Court of Session⁵¹ expressed a perfectly clear view that the Osborne decision has no application to unregistered unions.

"It is apparent that the ground of judgment that the purposes of a society are matters outside the purview of the Trade Union Acts, and therefore *ultra vires* can have no application to a society, which has no statutory constitution, and which is merely a voluntary association, such as an unregistered Trade Union."

In the circumstances of the particular case he held that the application of the trade-union funds for political purposes was a breach of contract. On the other hand, Leigh Clare, V. C.,⁵² has taken the opposite view, that unregistered unions are as much within the Osborne case as registered ones.

I submit that on principle Lord Skerrington's view is the right one and that the Osborne decision has no application to unregistered unions. The principle on which the doctrine of *ultra vires* becomes applicable to corporate or unincorporated bodies is well stated in Lord Macnaghten's judgment, as follows:

"It is a broad and general principle that companies incorporated by statute, for special purposes, and societies, whether incorporated or not, which owe their constitution and status to an Act of Parliament, having their objects and powers defined thereby, cannot apply their funds to any purpose foreign to the purposes for which they were established, or embark on any undertaking in which they were not intended by Parliament to be concerned. . . . This principle is not confined to corporations created by Special Acts of Parliament. It applies, I think, with equal force in every case where a society or association formed for purposes recognised and defined by an Act of Parliament places itself under the Act, and by so doing obtains some statutory immunity or privilege."⁵³

Now a union which applies for and obtains registration does exactly what Lord Macnaghten says. It voluntarily places itself under the Act, and by so doing obtains the privileges, not very extensive, it is true, but still actual privileges, conferred by registration. It does something analogous to what is done by a body of persons who apply for and obtain a grant of incorporation, and thereby subject themselves to a restriction to the purposes for which

⁵¹ *Wilson v. Scottish Typographical Association*, [1911] 1 Scot. L. T. 253.

⁵² Chancery Court of Lancaster, Manchester, July 8, 1910.

⁵³ [1910] A. C. at p. 94.

such incorporation is given. On the other hand, it is difficult to say that a trade union by merely coming into existence does anything analogous to placing itself under the Act. It no doubt gets the advantage — if its objects are in restraint of trade — that its contracts and trusts are not illegal, and are within limits enforceable. But this is something very different from the voluntary assumption of a status with counterbalancing disabilities, for it may well be that a society might prefer to retain its liberty of determining what purposes it would pursue even at the cost of remaining subject to the taint of common-law illegality. Further, there are, and apparently always have been, a considerable number of trade unions of which the purposes never were illegal at common law. Such unions, unless they applied for registration, never derived any benefit from the Trade Union Acts at all. If the opinion of the Court of Appeal in *Osborne v. Amalgamated Society of Railway Servants* (No. 2) is right, the defendant society in that case is an example of such a union.⁵⁴ Such a union, it is clear, might, apart from the Trade Union Acts, not only have lawfully pursued its trade purposes, but might have combined with them any political and other lawful purposes. It would certainly be a strange conclusion if the Trade Union Acts should be held to have taken away a liberty which such a society previously possessed.

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⁵⁴ It may be noted that this society, if its purposes were not illegal at common law, was not at the time of its formation in 1872 a trade union at all within the meaning of the Act of 1871, and was therefore at that time incapable of registration.

MONEY STOLEN BY A TRUSTEE FROM ONE TRUST AND USED FOR ANOTHER.

IF it be true of language in general that it is an imperfect contrivance for the expression of human thought, this is especially true of the maxims, technical terms, and stock phrases employed to express legal conceptions. They furnish many short cuts and save a deal of time. They tend on the whole to simplify the processes of thought. But they are usually silent as to the reasons for their being and seldom admit their own limitations. Terms such as those with which we are about to deal, like "subrogation," "tracing of trust property," and "purchaser for value," are all short cuts. They are familiar and invite us to use them. The mind feels at home in their company. That they are apt, however, to lead us astray is well illustrated by the recent case of *Newell v. Hadley*.¹

The case may be stated briefly as follows:

A man named Berry was trustee of two estates, the Newell Estate and the Pickett Estate. He had an inactive co-trustee of each estate. As trustee of the Pickett Estate, he had collected income with which he ought to have paid taxes and other bills but had stolen it. Wishing to conceal this theft and also to get more money which he could use dishonestly, he sold stock belonging to the Newell Estate and applied more than \$6500 of the proceeds to the payment of the bills of the Pickett Estate. About three months later he resigned as trustee of the Pickett Estate and settled his accounts, charging himself with everything for which he was properly chargeable and being allowed for the money stolen from the Newell Estate and paid to the creditors of the Pickett Estate. His co-trustee and beneficiaries of the Pickett Estate knew nothing about his wrongdoings. About three years later he was discharged as trustee of the Newell Estate and his defalcations were discovered. Nearly six years after Berry had settled his final account with the Pickett Estate the bill in this case was filed by Newell, as trustee of the Newell Estate, and his

¹ 206 Mass. 335, 92 N. E. 507 (1910).

beneficiaries against Hadley, who had succeeded Berry as a trustee of the Pickett Estate, his co-trustee, and their beneficiaries in order to recover the money which Berry had stolen from the plaintiffs. It was held that the defendants must pay the plaintiffs so much of the stolen money as Berry had used in paying debts of the Pickett Estate.

When we perceive that as between itself and Berry, the Pickett Estate had received no more than its due, we cannot help being surprised by the decision. If as a result of Berry's wrongdoings the defendants had got something to which they were not entitled and had got it at the plaintiffs' expense the equity would have been plain. But here were two estates represented by the same dishonest trustee. Neither trust, so far as Berry's co-trustee and beneficiaries were concerned, was any more responsible for Berry's wrongful conduct than the other. One trust was a heavy loser. The other had come out whole, but no more than whole. It is difficult to understand why equity should not have let the loss lie where it had fallen instead of transferring a portion of it to the innocent beneficiaries of the other trust.

Without going outside the opinion itself ² we find that if a trustee of two estates, N. and P., steals from Estate P. money which he ought to have paid to the beneficiaries of that estate by way of income, and afterwards steals money from the other estate and uses it to pay the beneficiaries of Estate P., Estate N. has no remedy. It has no remedy although its money can be traced directly into the hands of the beneficiaries who have received the full benefit. On the other hand, if the trustee steals from Estate P. money which he ought to have paid to creditors of that estate, and afterwards steals from Estate N. money which he uses to pay the creditors of Estate P. and later gets credit for such payments in a settlement of his accounts, Estate N. can trace the money into the benefit which Estate P. received through the payment of its debts and recover the value of that benefit.

The mere statement of these apparently irreconcilable propositions raises a strong suspicion in our minds that principles of equity, the operation of which depends so much upon chance and produces results so capricious, are not principles of equity at all.

² 206 Mass. 349, 92 N. E. 513.

Moreover, the consequences of the decision are really alarming. Henceforth the beneficiaries of a trust may take every precaution — make their trustee render accounts, go over the securities and examine the vouchers — but they can never be sure that he has not all the time been stealing from the estate, and paying the bills (which his accounts and vouchers show he has paid) with money stolen from other people. Years afterwards they may be mulcted for heavy damages under *Newell v. Hadley*. Or take a simpler case: I give my agent money to pay a debt; he steals the money and then to conceal his theft steals money from a stranger, pays my debt with it and brings me the receipted bill. Five years afterwards the stranger brings suit against me. Under *Newell v. Hadley* I should have to pay the bill again with interest.

In a case of this sort there are obviously two things to be considered: (1) whether the plaintiff has an equity to support his claim; and (2) if the plaintiff has an equity, whether the defendant has any equity on his side strong enough to meet and overcome the plaintiff's equity.

In discussing *Newell v. Hadley* we shall first deal with the plaintiffs' equity and show what it was.

The opinion of the court (Knowlton, C. J., alone dissenting) was written by Loring, J. After referring briefly to a number of cases, Loring, J., thus states the ground on which the plaintiffs' equity rested:

"There are suggestions in some of these cases that the doctrine on which they rest is that in such cases the lender [here the *Newell Estate*] is subrogated to the rights of the creditors. In others it is suggested that in these cases the true owner of the money is allowed to trace his property into the benefit enuring to the defendant, on the principle on which an owner can in equity trace his property into any form into which it has been wrongfully converted. And in others, that this is an independent ground of equitable relief. It is not necessary to determine whether these principles are not in their essence the same or what is the most accurate way of stating the principle on which these cases rest, for we are of opinion that they were well decided, and that the principle on which they rest is well founded and should be adopted by us."³

In order to reach any result in a satisfactory way it was clearly necessary for the court to determine whether the plaintiffs ought

³ 206 Mass. 342, 92 N. E. 510.

to have been subrogated to the rights of the creditors, or whether the plaintiffs could in any true sense trace their property. And if the relief was to rest on an independent ground it was necessary to determine what that ground was. We discover no attempt whatever to define the real substantive equity of the plaintiffs. If, to be sure, they had a right to recover, it made little difference whether the court worked out their remedy by saying that they could be subrogated to the rights of the creditors or by saying that they could trace their money into the benefit which the Pickett Estate had received. But no clear distinction was made by the court between an equitable doctrine in respect to the way in which a substantive right may be worked out, like the doctrine of subrogation, and an equitable doctrine which determines whether a plaintiff has any substantive right which ought to be worked out.

So far as the plaintiffs' right was concerned the court apparently did not regard the tracing theory as a mere fiction, but adopted it to some extent as the ground of its decision. The court also seems to have had in mind the fact that the defendants had been benefited at the plaintiffs' expense, but did not inquire whether this fact taken by itself would support the decision. Strangely enough we can put into a pot, say one pint of "benefit at the plaintiff's expense," a cupful of "tracing trust property," flavor the mess with a pinch of "subrogation" and a teaspoonful of something out of a bottle which has no label on it, and can thus cook up a recognizable and substantial equity.

The word "subrogation" discloses nothing as to the nature of the plaintiff's equity. There is of course always some substantive equity which induces the court to resort to subrogation, but the equity in one case may be quite different from what it is in another case. Take two familiar illustrations. A man insures his house against loss by fire and the house is burned through the negligence of a railroad company. For one and the same loss he has two remedies, — one against the insurance company and the other against the railroad. If the insurance company pays the loss equity will subrogate it to the assured's claim against the railroad, and allow the insurance company to prosecute the claim in the assured's name but for its own benefit. This is a case of actual subrogation. The insurance company's equity rests on the fact that it has paid the loss. Between it and the assured the latter has

no right to be paid twice, and if anything can be collected from the railroad to reduce the actual loss the insurance company is entitled to it. In case the assured has collected both his insurance and his damages there can be no actual subrogation, but the insurance company can be subrogated in equity and recover from the assured what he has collected from the railroad.⁴ Again, if two men stand to one another in the relation of principal and surety in respect to a debt and the surety pays the debt, he may be subrogated in equity to the rights of the creditor against the principal. The debt has really been discharged, but equity will deal with the matter as if the debt still existed and subrogate the surety to the creditor's rights. The equity rests on the duty which the principal owed to the surety to pay the debt. We do not find substantive equities like these in the case at bar. Assuming, however, that the plaintiffs had a good equity, it would have made no difference in the result whether the court had said simply that the defendants must pay the value of the benefit, or that the plaintiffs should be subrogated to the rights of the creditors.

It would seem unnecessary to argue that there could be no tracing of trust property in a case like *Newell v. Hadley* unless it had been mentioned by the court as a possible ground for equitable relief.

When trust property is traced it is always a part of the trust *res*, or something into which the trust property has been converted and with which it can be identified, that the court follows. The defendant has in his hands property to which the trust has attached. The equitable owner recovers it because the mere transfer of the legal title does not affect his equitable ownership. In the ordinary case where the defendant has paid value the equity clearly has nothing whatever to do with any benefit received by the defendant at the plaintiff's expense. Having bought and paid for the property the defendant has received no benefit. Yet if he took with notice of the trust he is charged with it. On the other hand, if the defendant be an innocent donee although there is nothing to affect his conscience with the trust, a court of

⁴ *Cf. Hart v. Western R. Co.*, 13 Met. (Mass.) 99, 104 *et seq.* (1847). The law in Massachusetts has been changed by statute. Rev. Laws (1902), c. 111, § 270. See *Lyons v. Boston & Lowell R. Co.*, 181 Mass. 551, 64 N. E. 404 (1902); *New England Box Co. v. N. Y. C. & H. R. R. Co.*, 210 Mass. 465, 97 N. E. 140 (1912).

equity allows the equitable owner to recover. The plaintiff's equitable ownership constitutes a sufficient equity. There is no equity on the donee's side.¹ The trust is attached to the property and the plaintiff's equity is worked out accordingly.

The defendants in *Newell v. Hadley* had got no part of the trust *res*. The money was gone. There it was in the hands of the creditors, who were so-called purchasers for value and could hold it against all the world. If Berry had bought a house with it you could have identified the house with the money. But the benefit which he bought for the Pickett Estate was intangible and could not be identified with any part of the property belonging to that trust. The beneficiaries of the Pickett Estate were perhaps better off by \$6500, but it was impossible to identify this general enrichment with any particular part of the trust estate.

If, then, the plaintiffs had an equity it could not rest at all on the tracing of the trust property, but must rest altogether either on the fact that the defendants had been benefited at the plaintiffs' expense, or on some "independent ground of equitable relief" which can be discovered in the cases to which Loring, J., referred. We do discover in those cases an "independent ground of equitable relief" which it is not difficult to state or describe, but we are wholly unable to see how it applies to *Newell v. Hadley*.

The leading case relied on for the establishment of the principle adopted by the court is *Bannatyne v. MacIver*.⁵ In that case the Lords Justices simply applied a doctrine which had often been applied where the officers of a corporation had borrowed without authority on behalf of the corporation to a case where an agent borrowed without authority on behalf of his principals who were partners. In the corporation cases it had been held that, although the lender had no action at law, he could recover in equity so much of the money as had actually been used for the benefit of the corporation.⁶ In *Bannatyne v. MacIver* an agent named Hudson had made an unauthorized borrowing on behalf of his principals. The plaintiffs were the lenders, the defendants were the principals. The borrowing would not have been necessary unless Hudson had drawn for his own use funds which his principals had provided and which as between Hudson and his principals he should have applied

⁵ [1906] 1 K. B. 103.

⁶ *In re Cork & Youghal Ry.*, L. R. 4 Ch. 748 (1869).

to the payment of bills which he in fact paid with the borrowed money. The borrowing though unauthorized was made ostensibly on behalf of the principals, the money was deposited to their account, and was used to a considerable extent for the payment of their bills.

In all such cases there is obviously a double equity. Not only is there the equity arising from the fact that if the agent's authority is denied, then the defendant's bills have been paid with money which belonged in equity to the plaintiff, and the defendant has received a benefit at the plaintiff's expense, but there is another distinct equity in the nature of an estoppel. To the extent to which the agent has actually used the borrowed money for the defendant's benefit, it is plainly inequitable that the defendant should be permitted to deny the agent's authority. In effect, the court says to the defendant: "While you enjoy the benefit of the agent's borrowing on your behalf, you cannot in equity deny your obligation to pay back the money. This estoppel, however, goes no further than to make you responsible for so much of the borrowed money as has actually been used for your benefit."

If Hudson had not tried to borrow on the defendants' behalf, but, in order to conceal his wrongful overdrafts, had stolen the money from the plaintiffs and used it to pay the defendants' bills, then we should have had a case like *Newell v. Hadley*. The defendants would have been benefited at the expense of the plaintiffs. The plaintiffs would have had this ground for equitable relief. But there would not have been a trace of the other equity. The plaintiffs could not have said that they had been induced to part with their money by any promise, which the agent had undertaken to make for his principals, to pay the money back. No sort of estoppel could have been invoked.

We do not say that this estoppel was present in all the cases to which Loring, J., referred. If a wife borrows money, there is no undertaking on her part that her husband will pay the money back. Yet if she actually uses it to buy necessities, the lender may perhaps recover the money from the husband in equity.⁷ The lender's money has been used to buy things which the husband was bound to supply. The husband has been benefited at the lend-

⁷ *Harris v. Lee*, 1 P. Wms. 482 (1718).

er's expense. This, however, is the only ground for equitable relief. It is plain that there can be no estoppel, unless the wife has undertaken to borrow as her husband's agent, when a court of equity could refuse to let the husband deny his wife's authority to the extent of the benefit which had actually enured to him through the use she made of the money.

We shall have occasion to refer again to *Bannatyne v. MacIver*. For the present we only want to point out that this element of estoppel was present as a ground for relief in the principal cases relied on by the court, and that in so far as they rested on that ground they were not applicable to the facts in *Newell v. Hadley*.

It is now apparent that there was really no mystery or difficulty in respect to the ground on which the plaintiffs in *Newell v. Hadley* could ask for relief. We accept the conclusion of the court that the money remained the money of the Newell Estate up to the moment when Berry used it to pay the Pickett Estate's bills. At that moment, however, the title to the money was transferred by the payment of it to the creditors. It then ceased to be the Newell Estate's money. By this wrongful use of the money Berry bought for the Pickett trust, for his co-trustee and his *cestuis* a discharge from any further liability in respect of those debts. This benefit was bought with the plaintiffs' money.

We have shown that "subrogation" is not a word to conjure with. We have excluded any notion that the trust property could be traced. We have also excluded any sort of estoppel. Nothing is left except the fact that the defendants received a benefit at the plaintiffs' expense, and we shall assume that this fact taken by itself afforded sufficient ground to support the plaintiffs' equity. If Berry had owed the defendants no duty to pay the bills, had not got credit for their payment in the settlement of his accounts, and the suit had been begun immediately after the payment, the plaintiffs' equity would have been clear enough.

Before we go on to consider the defendants' equities we wish to point out that although Berry had no transaction with the defendants in which he delivered to them the benefit which he had bought for them with the stolen money, and they knew nothing about it, the benefit was none the less actually received at the time when the bills were paid. This is necessarily involved in the decision. The

benefit was received by the defendants or the court could not have ordered them to pay the value of it. It was received at the dates when the bills were paid or the court could not have charged them with interest from those dates.⁸

It may be observed that if the defendants were to be charged in respect of any benefit received by them at the plaintiffs' expense, it was necessary to discriminate between the defendant trustees and the defendant *cestuis*. If the trustees were liable, they and not the *cestuis* should have been ordered to pay the amount due the plaintiffs and their liability should have been limited to the trust estate in their hands. If, on the other hand, the *cestuis* were personally liable, the trustees could not have been liable too, and each *cestui* was not liable for all of the plaintiff's money but only for the part of it which in some form or other he had actually received. The rescript sent down by the full court made no such discrimination, but ordered that a decree be entered directing the defendants generally to pay the amount due with interest.

It would be interesting to determine just where the benefit was when the suit was brought. Assuming that it was originally received by the estate, nevertheless when the suit was brought the estate was no larger or more valuable than it would have been if Berry had not paid the debts. The debts in question were payable out of income. If Berry had not paid them the trustees would have been obliged to pay them out of income which in good faith they had presumably paid over to the *cestuis*. At the time when suit was brought, therefore, the trustees did not have the benefit as part of the trust estate in their possession. The *cestuis* had already received it in the shape of income, and had probably spent it in the innocent belief that it was theirs to spend as they chose. The benefit could not at one and the same time have been both in the *cestuis* and in the trust estate.

Although these questions as to which of the defendants had been benefited, and to what extent, were questions which it was necessary for the court to determine in order to frame a proper decree, the defendants' equity which we are about to consider could have been invoked by all the defendants, no matter whether the benefit had enured to the trust estate, to the trustees, or to the *cestuis*.

⁸ 206 Mass. 354, 92 N. E. 515.

The most obvious equity on the defendants' side was that, in respect of the benefit which Berry had bought for them with the plaintiffs' money, they should have been treated like purchasers for value. The Chief Justice based his dissenting opinion on this ground, and we think that the rest of the court would have agreed with him if the nature of the plaintiffs' equity, the nature of the possible relief, and the reasons why one who receives trust property in payment of a preëxisting debt is often treated like a purchaser for value, had all been made plain.

We think we have made it perfectly clear what the nature of the plaintiffs' equity was. In doing this we have shown incidentally what it was that the plaintiffs were asking the court to take away from the defendants, namely, the benefit which Berry bought for them when he paid the debts and not the money which he used for that purpose. This seems perfectly obvious, but curiously enough it is the point on which the court really split. The Chief Justice makes it clear that he is talking about the benefit as the thing which the defendants could hold as purchasers for value. But the court sometimes talks about the benefit which enured to the defendants and at other times about the defendants' being regarded as purchasers for value of the money itself, in a way which renders the opinion extremely difficult to comprehend.

To show that the court actually entertained the notion that it was the money itself which the defendants might or might not hold as purchasers for value, we need quote only two passages:

"When Berry repaid in part the money stolen from the defendants by paying their debts with the \$5522.70 stolen from the plaintiffs, Berry and Berry alone represented the defendants in receiving the \$2652.70."⁹

Again, dealing with the possible effect of the accounting which took place between Berry and his co-trustee and beneficiaries after he had spent all the money stolen from the Newell Estate, the court said:

"There was no fund then in existence of which the defendants could become purchasers for value without notice. How that accounting could be held to make the defendants purchasers for value without notice of money which had been paid out three months before has not been explained."¹⁰

⁹ 206 Mass. 348, 92 N. E. 513.

¹⁰ 206 Mass. 349, 92 N. E. 514.

How it could ever have been supposed that the defendants received the stolen money and might stand as purchasers for value in respect to the money we cannot conceive. The benefit was what they received. It was just as if it had been Berry's duty as trustee to buy bonds for his *cestuis* with the income of the Pickett Estate which he had stolen, and he had used the money of the Newell Estate to discharge this duty, asking the seller to send the bonds to the *cestuis*. In that case, although the plaintiffs' money could have been traced directly into the bonds the *cestuis* could have held the bonds as purchasers for value just as they were allowed to hold the money of the Newell Estate paid to them by way of income.¹¹ Our contention is that when the defendants had given Berry credit for the payment of the debts they were in equity just as much purchasers for value of the benefit as they would have been of the bonds.

There is another curious thing in the opinion which makes the reasoning difficult to follow. That the defendants' right to be regarded as purchasers for value depended on the fact that, as between them and Berry, Berry owed them a duty to buy for them the benefit which they received, would seem to be obvious. We find, however, that the court dealt with the argument that the defendants were purchasers for value and disposed of it without any clear reference to that fact,¹² and then said:

"The *only other ground* [the italics are ours] on which the defendants could be thought to have a better equity than the plaintiffs arises from the fact that the defendant trust had provided Berry with money to pay the debts paid by him with the money of the plaintiffs."¹³

What this fact could have had to do with any equity of the defendants unless to put them in the position of creditors who had received something from Berry in payment of a preëxisting debt so that they might be treated like purchasers for value it is hard to understand.

Perhaps the court reasoned in some such way as this: "In every case brought to our attention in which the defendant has been treated like a purchaser for value there has been some transaction between him and the trustee in which the legal title to property has

¹¹ 206 Mass. 349, 92 N. E. 513.

¹² 206 Mass. 348-351, 92 N. E. 513-514.

¹³ 206 Mass. 351, 92 N. E. 514.

been transferred. Without such a transaction you cannot have a purchaser for value. The money of the Newell Estate which Berry used to pay the debts was the only property in respect of which there was any such transaction. If therefore the defendants did not receive the money they cannot be regarded as purchasers for value of anything at all. The purchaser-for-value argument can be thoroughly disposed of by showing that when the money was paid by Berry to the creditors no innocent person representing the defendants received it."

If this was the line of reasoning, we have a good illustration of the danger referred to at the outset of using a familiar term like "purchaser for value" without understanding its meaning as applied to the case in hand.

We realize perfectly well, that, before the accounting which took place later between Berry and the Pickett trust, there was no transaction between Berry and any innocent person representing the trust, no transfer of any legal title, and no innocent person representing the trust even knew that the benefit had been received. We mean to show, however, that when trust property has been taken by a defendant in payment of a preëxisting debt due from the trustee there is nothing in the fact that the defendant has obtained the legal title to the property which makes his position any better, so far as the reason and equity of the purchaser-for-value rule are concerned, than was the position of the defendants in *Newell v. Hadley* who had obtained a benefit which a court of law would not take away from them. We also mean to show that there is nothing in the transaction which usually takes place between the trustee and the innocent defendant to affect the latter's equitable right to keep what he has got, except his knowledge of the payment and his very natural belief that the debt has been discharged. In *Newell v. Hadley*, when Berry's accounts were allowed the defendants all knew that he had paid the bills, and believed that he had thus discharged *pro tanto* his obligation to account for the income of the trust estate.

The term "purchaser for value" has very different meanings in different cases. In the original sense of the term a purchaser for value is one who pays value at the time he purchases. He may purchase negotiable paper or bonds from a man who has no title without notice of his want of title. He may purchase property from

a trustee who has the legal title without notice of the trust. In either case he can hold the property. To take it away from him would make him lose the money he has paid; to make him pay the value of the property would be making him pay twice for the same thing. His equity is manifest.

Subsequently the term "purchaser for value" was applied to a person who does not pay anything at the time he takes the property but receives it in payment of a preëxisting debt. In such a case it is obvious that taking the property away from him immediately after the transaction would inflict no loss, but would put him in exactly the same position that he was in before he received it. His equity is by no means so clear as the equity of a man who gives value in exchange for the property.

It was assumed, however, by all the judges, in *Newell v. Hadley*, to be well settled that a person who receives money or any sort of negotiable instrument without notice and in payment of a preëxisting debt is a purchaser for value, and that the same principle applies whether the preëxisting debt be an ordinary debt or some sort of an equitable obligation.

We have said that the equity of the innocent person who has actually paid value is manifest. It now behooves us to consider why one who has taken the property for a preëxisting debt is treated like a purchaser for value.

If we try to find the reason of the rule, we naturally look for it in the transaction. So much has been said about the transaction between the trustee and an innocent person that we are led to suppose that we shall find in the transaction itself something which gives rise to the equity. Let us then see what the transaction really amounts to.

The transaction between the unfaithful trustee and the innocent purchaser who actually pays value consists of two parts: the trustee transfers the legal title; the purchaser pays for the property. So far, however, as the equity is concerned, the passing of the title counts for nothing. It is, to be sure, a condition precedent, but only in this sense, that unless the purchaser has got the legal title there is no occasion to consider his equitable right to retain the property. If he were an innocent donee or took with notice he would get a good legal title, but a court of equity would take the property away from him. It is his payment

of value which gives rise to his equity. In this way only is the transaction important.

On the other hand, the transaction which takes place between the unfaithful trustee and the man who takes the property for a preëxisting debt is one-sided. The trustee gives his creditor the legal title to the property, the creditor gives nothing. In this case the mere transfer of the legal title counts for no more than it does in the other. The equity depends altogether on the existence of the preëxisting debt. We talk in a loose way about the creditor's giving the trustee a discharge. He really gives nothing. To say that he gives a discharge of the debt means only that he takes the property in payment. It is the law and not the creditor that gives the discharge. And even if the creditor may truly be said to give something, it costs him nothing. So far as the immediate transaction of giving and receiving payment is concerned, the creditor only receives a benefit. The *quid pro quo* was given in an earlier transaction which created the debt.

Inasmuch as the equity or reason for the well-established rule in the ordinary case is not to be found in the passing of the legal title to the property, or in the transaction itself, we have to look for it elsewhere. It is not far to seek. It is easily discovered in the fact that as a practical matter the owner of the equitable title can seldom if ever have his remedy instantly applied, and unless it be instantly applied the court feels no certainty that it can put the defendant back in the same position that he was in before he received the property in satisfaction of his debt. He may very likely have failed to pursue his debtor as he otherwise would have pursued him. The debtor's ability to pay may have become impaired. And a court of equity is not at all willing to run the risk of doing an injury to an innocent person for the benefit of a plaintiff whose trustee has been guilty of a breach of trust. The defendant's change of position, which may or may not be susceptible of proof but yet takes place in almost every case, constitutes a substantial equity and justifies the rule.

We have already shown that the transfer of the legal title has nothing to do with the equity of the defendant's position, but merely creates the condition of things which requires a court of equity to consider whether or not the defendant should be compelled to surrender what he has got. Now this condition of things existed in

Newell v. Hadley. The defendants had received the benefit which Berry had bought for them with the plaintiffs' money and had a perfect legal right to retain it. The only question was whether a court of equity should compel them to surrender it, or what is the same thing, pay the value of it, to the plaintiffs.

As to the innocence of the defendants no question was raised. Nor was there any question in respect to the preëxisting debt. Berry owed the defendants a duty to account for the income. This was the duty which he owed in respect to the part of the plaintiffs' money which he paid to his *cestuis* in cash and which they were allowed to hold as purchasers for value. And if it had been Berry's duty to buy certain bonds for his *cestuis*, and he had received income enough to make the purchase but had stolen it, and had then bought the bonds with the plaintiffs' money and had delivered them to the *cestuis*, the same obligation resting on Berry would have made the *cestuis* purchasers for value of the bonds. It will also be observed that although the plaintiffs' money could have been traced directly into the bonds, this circumstance would not have weakened the equity of the *cestuis*. For all purposes, the duty of Berry to account to his beneficiaries for the income was equivalent to the preëxisting debt of the ordinary case.

The defendants being innocent, having got the legal title to the benefit which the court was asked to take away from them, and Berry having bought the benefit for them in payment of a preëxisting debt, nothing further is required to bring the case within the reason of the rule except to show that the defendants received what Berry had bought for them in discharge of the debt. Berry, as we know, asked to be allowed for the payments in his accounts, and the defendants did allow him credit therefor. When the accounting had taken place, it was just as if the defendants had known of the payments when they were made and had given Berry some sort of acquittance at that time. As soon as the accounting had taken place the defendants believed that the debt had been discharged and thereafter governed themselves accordingly. This made the analogy perfect between their case and that of the ordinary purchaser for value who has taken the property for a preëxisting debt. There is more than a perfect analogy. The cases are in every essential particular the same. Every reason of equity and practical expediency which has induced courts to treat the defendant like a purchaser

for value in the ordinary case held good and made it equitable to treat the defendants like purchasers for value in *Newell v. Hadley*.

When the subject has thus been stripped of everything non-essential and merely accidental, so that we can see the real equity of the defendants, this is what we find. We now see why it was that when we were told that the defendants might have kept the money but could not keep the benefit bought for them with the money, we felt that the distinction was too flimsy to be sound, and must be due to some sort of intellectual hocus pocus.

If there be any valid distinction between a case where a trustee wrongfully delivers a chattel to his creditor in payment of a pre-existing debt, and a case where he wrongfully delivers money, a cheque, a note, or other negotiable instrument,¹⁴ then the benefit which Berry bought for the trust with the plaintiffs' money should clearly have been regarded as the equivalent of money. Whenever in an accounting a trustee gets credit for money expended for the benefit of his trust, and money was actually used as he says it was, then it must be that the trust stands in respect of the benefit so received just as if the money itself had been turned over to the *cestuis* instead of to the creditors. This proposition cannot be denied without impairing the negotiable character of money. Take one or two illustrations. Suppose that A. has been acting as B.'s agent in the purchase of goods. A. renders an account in which he charges himself with say one hundred items of money paid to creditors for as many different lots of goods and produces the receipted bills. The account shows a balance still due to B., which A. tenders in cash. B. has a right to assume that the money A. used to pay the bills was either B.'s money in A.'s hands, or A.'s own money. He need not go behind each of the one hundred receipted bills and satisfy himself that the money A. used was not stolen money. He can accept the account and vouchers with the same confidence that he accepts the money tendered him to square the account. Take another illustration suggested by the case in hand. Suppose that Berry's co-trustee had become aware of the fact that although Berry had collected income enough the tax bill had not been

¹⁴ Cf. *Goodwin v. Mass. Loan & Trust Co.*, 152 Mass. 189, 199, 25 N. E. 100 (1890); *Blanchard v. Stevens*, 3 Cush. (Mass.) 162 (1849).

paid; that he had gone to Berry and had told him that the taxes must be paid; and that Berry had said, "Yes, I ought to pay them. Come with me to City Hall and see me pay the bill"; and suppose that they had gone together to the collector's office where in his co-trustee's presence Berry had paid the tax bill, using for the purpose the plaintiff's money but keeping his co-trustee in ignorance of that interesting feature of the transaction. The city could have kept the money, because it was money and was taken in good faith and in payment of a preëxisting debt. By the same token the innocent co-trustee would have had a right to keep the benefit which Berry bought for the trust, because he knew that it was bought with money, and accepted this use of the money in satisfaction of Berry's obligation. Money being money, the co-trustee would have had a perfect right to assume that Berry was the owner, to treat him accordingly, and to go his way satisfied that Berry had so far discharged his duty. Yet there would have been no transaction between Berry and his innocent co-trustee in which the money was delivered to the latter. The innocent co-trustee would have been but a spectator of the passing of the money. The transaction between the two trustees would have been in the nature of an accounting, the one doing something he was bound to do, the other accepting the benefit enuring to the trust in satisfaction. No one can doubt the right of the innocent co-trustee to be treated as a purchaser for value in the case supposed, — not of the money itself, because he did not receive the money, but of the benefit bought for him with the money. Yet, being a mere spectator of the transaction between Berry and the city, his knowledge of the payment and acceptance of it in satisfaction of Berry's debt to the trust are the only essential things making him a purchaser for value of the benefit. If, then, the bill be paid without the knowledge of the co-trustee the benefit enures to him just the same. And if he afterwards learns that the bill has been paid with money and gives Berry a discharge on the faith of it, the equity of his position is just as strong as if he had obtained his knowledge by witnessing the payment.

The talk about subrogation suggests still another way of illustrating the point. The title to the money which Berry used to pay the defendants' bill, was in Berry and in his co-trustee, Newell. If in equity the debts were not paid but were kept alive, then Berry

and Newell became the equitable assignees of the debts, holding them in place of the money and in trust for the Newell Estate. If Newell had discovered Berry's misappropriation of the money, it would have been his duty as trustee to enforce payment of the debts and thus recover the money. But so long as Berry kept his secret, there were still persons in the world, namely, his innocent co-trustee and the *cestuis* of the Pickett Estate, in dealing with whom he could use the debts just like money. He could in effect make a tender of the benefit he had bought for the Pickett Estate just as effectually as if he made a tender of so much money. He had but to produce his paid cheques or receipted bills, and the allowance of the corresponding items in the account was inevitable. It is impossible to see why the Newell Estate should, by reason of what in fact occurred, be in any better position or the Pickett Estate in any worse position than it would have been in, had Berry retained the money itself and had paid that over at the time of his accounting.

It remains for us to examine some of the other points made in the course of the opinion, and to show that they are either specious only or beside the mark. The first of these can hardly be called even specious. To say as the court did that the account was a lying account and that the defendants were not bound by it,¹⁵ or "It cannot be that in equity the defendants are to have both their claim against Berry . . . and the payment of their debts . . .,"¹⁶ does not help to answer the question whether what occurred at the time of the accounting gave the defendants a right in equity to keep what they had got. These observations of the court simply beg that question. If the defendants, through Berry's wrongful use of the plaintiffs' money, got no benefit which they could retain, then of course Berry should not have been allowed for the payment of the bills. On the other hand, if the defendants did have a right to retain the benefit because they became purchasers for value at the time of the accounting, then the account was not a lying account, and they had no claim against Berry for the money he had stolen from them but had accounted for by showing that he had paid the bills in question. The reasoning of the court would make it impossible ever to treat a man like a purchaser for value in respect of property taken in payment of a preëxisting debt.

¹⁵ 206 Mass. 350, 92 N. E. 514.

¹⁶ 206 Mass. 351, 92 N. E. 514.

In this connection attention may be called to the fact that if Berry's obligation to the Pickett Estate was discharged, the benefit which the Pickett Estate received through the payment of its bills was offset by the loss, to an equal amount, of its claim against Berry. In other words, Berry had used the plaintiffs' money not only to pay the bills, but also to obtain his own discharge, so that the trust estate was not benefited but was only made whole. It is a curious circumstance that if the defendants' equity to retain the benefit as purchasers for value was a good equity, it not only defeated but utterly destroyed the plaintiffs' equity, because the plaintiffs could no longer say that the Pickett Estate had been unjustly enriched by the use which Berry had made of their money.

It makes no difference, so far as the right of the defendants to be regarded as purchasers for value was concerned, whether the benefit enured to the Pickett Estate, to the trustees, or to the *cestuis*. In the probate accounting the innocent trustee of the Pickett Estate represented the estate. The *cestuis* represented themselves. Each and all had a right to make Berry account, and consented to his discharge in the belief that he had paid the bills with money which he ought to have used for the purpose.

In all the reasoning of the court in respect to the effect of the accounting the trouble is due to the fact that the court confused what the defendants actually received with the money which Berry used to pay the debts. It was this confusion of ideas that led the court to say that the plaintiffs' rights were fixed when Berry paid the defendants' debts with the plaintiffs' money. But suppose again that Berry's duty to the defendants had been to buy them bonds, and that he had bought the bonds with the plaintiffs' money, but suppose for our present purpose that he had held the bonds till the time of the accounting when he had turned them over to the *cestuis*. No one would venture to say that the plaintiffs' rights were fixed when Berry used the money for the defendants' benefit, that the bonds belonged to the plaintiffs in equity because Berry had bought them with the plaintiffs' money, and that the subsequent delivery to the defendants did not make them purchasers for value. If the actual receipt of the thing in question with knowledge and an intention to discharge the debtor is the essence of the equity, then the defendants' equity remained in abeyance, as it were, from the time when the bills were paid until Berry settled

his account. The knowledge which they then received and the discharge of Berry perfected the equity.

It would serve no purpose to follow the opinion through all the discussion which it contains, based on the theory that when Berry paid the money to the creditors he somehow or other paid it to himself as the defendants' trustee. The case of the *Atlantic Bank v. Merchants' Bank*, for example, discussed by the court,¹⁷ had no application to the case at bar except on this impossible theory as to what the defendants had actually got and claimed a right to hold.

We wish, however, to say something about *Bannatyne v. MacIver*,¹⁸ cited by the court to the point that the state of the accounts between Berry and his trust could have no effect to raise an equity on the defendants' side strong enough to overcome the plaintiffs' equity. Our court failed to perceive that the plaintiffs in the English case not only had the equity resting on the fact that their money had been used to pay the defendants' bills, but also had the equity resting on an equitable estoppel which made it unjust for the defendants to deny the agent's authority to the extent to which as their agent he had actually used the money for their benefit. Hudson, the agent in the English case, had not attempted to discharge any duty that he personally owed to the defendants by borrowing the money and using it to pay the defendants' bills. If he bought for them a benefit by the payment of the bills he tried to impose on them a corresponding burden by borrowing the money in their names. He undertook to borrow the money and to use it simply as their agent. If in *Bannatyne v. MacIver* it had appeared that the defendants had become aware of Hudson's improper withdrawals, and in consequence had demanded that he pay the bills from his own resources, and he had then stolen the plaintiffs' money, paid the bills, sent the receipts to the defendants, and settled his accounts with the defendants, the case would have been like *Newell v. Hadley*, but it would have been a widely different case from that with which the English court actually had to deal.

How wide the difference between *Bannatyne v. MacIver* and

¹⁷ 10 Gray (Mass.) 532 (1858). The discussion is in 206 Mass. 350-351, 92 N. E. 513, 514.

¹⁸ [1906] 1 K. B. 103, *supra*, p. 607. See the discussion of this case in 206 Mass. 352, 92 N. E. 514.

Newell v. Hadley is, can be shown by supposing a case which lies midway between the two. Suppose that Hudson in response to a demand that he make good his overdrafts had gone out and fraudulently borrowed money in the defendants' names, had paid their bills with it and had thus obtained credit in an accounting with them. Here the equitable estoppel might possibly have been invoked. On the other hand, it could have been argued that when Hudson used the borrowed money to pay the bills he used it not only to buy a benefit for the defendants, but also used it to discharge his own personal obligation to them. In this case the defendants' right to be regarded as purchasers for value would have overcome the plaintiffs' equity. For if Hudson to make good his shortage had fraudulently borrowed money in the defendants' names and paid it over to his principals, they would have been purchasers for value of the money. And if of the borrowed money itself, then why not of the benefit which he bought for them with the borrowed money and for which he got credit?

Disregarding any possible equity on the defendants' side other than those considered by the court, we think that we have shown that the decision was as wrong as wrong could be. In the first place, the court failed to understand the nature of the plaintiffs' equity and the extent to which the cases relied on were really applicable. In the next place, the court wholly misconceived what it was that the defendants had got and in respect to which they might be treated as purchasers for value. And, finally, the court failed to perceive on what the equity of a so-called purchaser for value, who has taken property for a preëxisting debt, really rests.

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BOSTON, MASS.

DE FACTO CORPORATIONS.

THE formation of corporations solely by the mutual agreement of the members is prohibited by the common law. In the American states to-day corporations are organized almost exclusively under general incorporation laws authorizing their formation. If the requirements prescribed by the statute are not observed there are three conceivable alternatives open to the courts. First, they may place the resulting association on the same basis as those which have fully complied with the law. Second, they may refuse to recognize the existence of the association and consider all its acts null and void. Third, they may take a middle ground and give the corporation a qualified recognition.

To adopt the first alternative in some cases would violate the common-law prohibition upon the formation of corporations by private contract and nullify the statutes of incorporation. The courts have, therefore, not found this first alternative a good rule to apply in all cases. But where the above-mentioned objections do not obtain they have adopted this alternative and have treated the corporation, though not organized in the manner outlined by statute, as a corporation *de jure*. The courts do this, for example, where the provisions of the statute have not been literally complied with, but have been substantially followed,¹ or even where the provisions of the statute have not been followed at all if the provisions are merely directory or constitute conditions subsequent to incorporation.²

To adopt the second alternative and deny existence to a corporation existing in fact and refuse to give validity to any of its acts would be illogical and frequently work injustice, so the courts have used this alternative only where there has been no, or very little, compliance with the statute.

Where the corporation has fallen a little short of substantial compliance, the courts have adopted the third alternative and have recognized the legal existence of the corporation for most purposes.

¹ 20 HARV. L. REV. 467, note 16; Machen, Modern Law of Corporations, § 264.

² 20 HARV. L. REV. 467, notes 17 and 18; Machen, Modern Law of Corporations, § 264.

If "the associates have made an attempt to incorporate resulting in a colorable corporate organization; [under] a law authorizing the formation of such a corporation as was attempted; [and] there had been use of some of the powers which such a corporation would possess; [and] the persons seeking to prevent collateral attack [have] acted in good faith," a *de facto* corporation is created.³

The state may annul its charter for failing to comply with the statute, but no one else can take advantage of its defective incorporation to increase his own rights or vary the obligations of the corporation's stockholders. The American decisions are authority for the proposition that a corporation *de facto*, as defined above, is equivalent to a corporation *de jure* except for those legal consequences which necessarily result from the possibility of the *de facto* corporation having its existence forfeited by the state for failing to comply with the statute under which it was organized. This is the *de facto* doctrine. To the broad statement that the *de facto* corporation is just as good as the *de jure* corporation except as against the state, there are two well-known classes of cases which are exceptions. These classes of cases, for the purposes of brevity, may be designated as the eminent-domain and the stock-subscription cases. These cases, while they are exceptions to the broad statement made above, are not, as will be shown later, exceptions to the *de facto* doctrine. In fact there are very few, if any, defensible American decisions, involving the question, which cannot be explained by an unqualified application of the *de facto* doctrine.⁴

In spite of the vast array of authority to the contrary, it is still contended in numerous *dicta*⁵ by the courts and in the occasional *ipsi dixit* of legal theorists that there is no distinct doctrine of *de facto* corporations. They admit the doctrine is applied but not that it has ever had an independent application. It cannot stand on its

³ 20 HARV. L. REV. 464.

⁴ "Cases not seldom arise in which some condition precedent to the legal organization of a corporation has been omitted, and in which no conclusive certificate of due incorporation exists, and in which no estoppel to deny the company's existence can be invoked. In such cases, the American courts generally will, under certain conditions, hold that the association although not legally incorporated is nevertheless a corporation *de facto*, that is to say, an association whose right to corporate functions and attributes is complete as against all the world except the sovereign." Machen, *Modern Law of Corporations*, § 284.

⁵ *Slocum v. Providence Steam & Gas Pipe Co.*, 10 R. I. 112, 114 (1871). 1 Machen, *Modern Law of Corporations*, 242, note 1, cites cases.

own legs, they say, but must be propped up by other theories. Its sole application is made in conjunction with "extenuating circumstances."⁶ As there is regularly no refusal by the courts to apply the *de facto* doctrine wherever a *de facto* corporation exists, the zealous advocates of restriction have busily occupied themselves in the search for "extenuating circumstances" as the basis for invoking the doctrine. They find the doctrine of *de facto* corporations applied where there has been dealing on a corporate basis. Dealing on a corporate basis then becomes the "extenuating circumstance" warranting an application of the doctrine. In such cases they say not only that the *de facto* corporation, but also the one who dealt with it, is conclusively estopped from asserting defectiveness in the incorporation of the company. But dealing on a corporate basis is not an "extenuating circumstance" found in all the cases where the *de facto* doctrine is applied. For example, one who has taken title to land from a *de facto* corporation may eject a stranger to that title from possession of the land.⁷ An opponent of the *de facto* doctrine finds an "extenuating circumstance" justifying an extension of the doctrine to cases such as that just alluded to in the fact that relief is sought by a "third person." The doctrine of *de facto* public officers, he observes, affords relief to "third persons," but never to the public officers themselves. To his mind the application of the doctrine of *de facto* corporations for the benefit of "third persons" and for the denial of relief to the associates is analogous.⁸

Furthermore, the "extenuating circumstances" of dealing on a corporate basis and the "third person" seeking relief do not include or explain all the cases where the *de facto* doctrine is applied. The *de facto* corporation, itself, is frequently given relief where there has been no dealing on a corporate basis, and therefore in cases where, admittedly, the elements of estoppel are not present. Thus the *de facto* corporation may maintain ejectment against a stranger to the title or an action of tort against a trespasser.⁹ The resources of these adversaries of the doctrine are again taxed, and they come

⁶ Professor E. H. Warren, *De Facto Corporations*, 20 HARV. L. REV. 456.

⁷ *Finch v. Ullman*, 105 Mo. 255, 16 S. W. 863 (1891). For other cases holding that the *de facto* corporation may be a conduit of title see 20 HARV. L. REV. 457, note 2.

⁸ Professor Warren, *De Facto Corporations*, 20 HARV. L. REV. 458.

⁹ See cases cited in 20 HARV. L. REV. 471, note 24.

forth with the suggestion of another "extenuating circumstance." To explain such cases, they say if the associates are asserting a right in the name of the corporation which they would be entitled to assert in some form, they should be allowed to assert it as an artificial person.¹⁰ There are two obvious faults to be found with this suggestion: It would apply as well to an association which had not met the requirements of the *de facto* doctrine as to the *de facto* corporation, but the courts do not give such an association relief;¹¹ and to give such association relief in its artificial name would run counter to well-established precedent in partnership law.¹²

But there are still other cases where the *de facto* doctrine is applied, and for which these opponents of the doctrine have not yet suggested an "extenuating circumstance" to warrant its application. "Under a statute punishing criminally embezzlement from an 'incorporated company' a conviction may be sustained if the company is a corporation *de facto*."¹³ Numerous other instances of the doctrine's application may be cited,¹⁴ but enough has been said to show that there is still need for ingenuity in suggesting further "extenuating circumstances."

Since the American decisions involving the *de facto* doctrine are uniformly explainable by an application of that doctrine alone, the query naturally suggests itself whether a search in each instance for "extenuating circumstances" as a basis for invoking the doctrine is not, after all, superfluous labor?

The arguments used to show that the doctrine is and should be restricted in its application may be grouped under four heads. 1. Judicial legislation. 2. The analogy of the doctrine of *de facto* public officers. 3. Estoppel. 4. The eminent-domain and stock-subscription cases. A very exhaustive and cogent presentation

¹⁰ 20 HARV. L. REV. 470.

¹¹ *Jones v. Aspen Hardware Co.*, 21 Colo. 263, 40 Pac. 457 (1895). See cases cited in Cook, Corporations, 6 ed., 1818, note 1.

¹² Parties cannot sue in the firm name but must sue collectively as individuals in the absence of statute. Mechem, Elements of Partnership, § 225.

¹³ *People v. Carter*, 122 Mich. 668, 81 N. W. 924 (1900). The statement is quoted from Machen, Modern Law of Corporations, § 292.

¹⁴ A corporation *de facto* cannot be wound up as a partnership. Its dissolution is governed by the same principles as the dissolution of a *de jure* corporation. A statute applicable to unincorporated companies does not apply to *de facto* corporations. See cases cited in Machen, Modern Law of Corporations, § 292.

of these arguments against the unlimited application of the doctrine of *de facto* corporations, the fullest the writer has met with, is made in an article on *De Facto Corporations* by Professor E. H. Warren in volume 20 of this Review. It will be sufficient for the purpose of this paper, which is to show that these arguments are unsubstantial, to confine our discussion almost wholly to his statement of them.

1. *Judicial legislation.*

The argument that the doctrine of *de facto* corporations is judicial legislation, Mr. Warren states substantially in this way. It is not for the courts to create a corporation. The franchise to be a corporation can be granted only by the legislature. The legislature has prescribed certain conditions precedent to incorporation, and if these are not fulfilled the resulting organization is not a corporation authorized by the legislature. If its existence is legally recognized by the courts, it is a creation of the courts, not of the legislature.¹⁵

It must be observed that this statement of the argument of judicial legislation goes against the whole doctrine of *de facto* corporations and not merely against applications of it in particular instances. Mr. Warren admits this, but he thinks the doctrine should be applied wherever the existence of "extenuating circumstances" warrant it, but not in the absence of such "extenuating circumstances." In order to make the argument of judicial legislation favor a restricted application of the *de facto* doctrine Mr. Warren's contention, novel as it is, amounts to this. The courts should deliberately "take to themselves powers belonging to the legislature" whenever they think the considerations for so doing are sufficiently urgent, but they should in each case use great care in determining whether the encroachment will be proper.¹⁶

Where a doctrine is presented to a court for the first time the argument that its adoption will constitute judicial legislation, if sound, is of the greatest weight, for clearly no court should consciously usurp legislative functions. But after such a doctrine has become established law the courts are not exercising a legislative power in applying the doctrine to the cases that come before them.

¹⁵ 20 HARV. L. REV. 468, 469.

¹⁶ *Ibid.* 469.

They are merely applying the law. Since the doctrine of *de facto* corporations is now well-established law in the American states, it would seem that the argument that a court is invading the domain of the legislature in applying the doctrine, even if originally true, no longer obtains.

But in establishing the doctrine of *de facto* corporations originally is it so clear that the courts were legislating? We cannot agree with Mr. Warren that the right to act as a corporation is a franchise,¹⁷ and therefore a right to be granted only by the legislature. The corporation, looked at fundamentally, is rather an association formed by the mutual agreement of its members, which the common-law principle of freedom of contract would permit to be formed by contract alone. The common-law prohibition upon the formation of corporations by private contract is a limitation upon freedom of contract based upon public policy. The privilege of doing business exempt from individual liability opened the door to imposition and fraud. Without this possibility of unfairness there is no objection to corporations being formed by contract without other formalities.¹⁸ The chief purpose of incorporation laws

¹⁷ "When individuals may incorporate themselves by these simple means, the notion that the right to be a corporation is a franchise is manifestly baseless. The right was formerly a franchise, when it could be secured only by the special favor of the crown or of the legislature. But a franchise is a special privilege, and any right that can be obtained by anybody merely by going through a few statutory forms cannot properly be designated by that term. As well might it be said that the right to make a conveyance of real estate is a franchise because the deed must be signed and sealed by the grantor with certain formalities and recorded in the registry of deeds. The requirements for the formation of a corporation are scarcely less simple. More than twenty years ago, Mr. Morawetz with his accustomed accuracy and insight said, 'The right of forming a corporation and of acting in a corporate capacity, under the general incorporation laws, can be called a "franchise" only in the sense in which the right of forming a limited partnership or of executing a conveyance of land by deed can be called a franchise.'" Machen, *Modern Law of Corporations*, § 19.

¹⁸ "The only argument against leaving the exercise of corporate power entirely unrestricted by law is the argument of public policy. It may be said that the non-responsibility of the individual shareholders for corporate acts and liabilities would be productive of fraud and imposition; for persons dealing with a self-constituted corporation would have no means of knowing its capital and its constitution, and yet could not have recourse against the individual members, as in case of a copartnership. The objection here stated might, however, be remedied by requiring due notice of the corporate organization to be given to the world. And this seems to be the chief office of the general incorporation laws which are now in force nearly everywhere. To a great extent they repeal the prohibition of the common law, and leave the right of forming a corporation and of acting in a corporate capacity free to all, subject merely to

is not to prohibit the formation of corporations in ways not provided for by statute, but to point out a way to remove this objection of public policy upon which the common-law prohibition is based.¹⁹ Where the objection is removed, no reason is left for maintaining the prohibition. Substantial compliance with the statute, the courts say, removes the objection, and no one is heard to object because the prohibition is not enforced. But in many cases the objection is removed without a substantial compliance, and in such cases why should not the prohibition likewise disappear?²⁰ The American courts have come to the conclusion that satisfaction of the requisites of the *de facto* doctrine not only removes the basis for objecting on any ground of public policy, but raises an urgent consideration of public policy against refusing to recognize the legal existence of the corporate entity.²¹ It prevents annulment of the acts of a corporation on the ground of a technical flaw in the incorporation proceedings. In establishing the *de facto* doctrine, then, it seems the courts were neither making nor annulling legislative enactments, but following their common practice of adapting the common law to changed conditions.

such limitations and safeguards as are required for the protection of the public." Morawetz, *Private Corporations*, §§ 652, 744.

"No sufficient sound economic reason applicable to modern conditions can be adduced to support this common-law doctrine. For, in a free commercial country, individuals should have the power by mere private contract or agreement to associate themselves together as a corporation for any merely private lawful object. They should enjoy the same freedom in the formation of corporations that Anglo-Saxon jurisprudence has always accorded in the formation of partnerships or voluntary associations. To be sure, safeguards should be provided against fraud, and particularly against abuse of that immunity from individual liability of the members for the debts of the company which in popular estimation constitutes the most valuable, if not the most essential, characteristic of a commercial corporation. But subject to all needful restrictions of this sort, the organization of corporations in any country that prides itself on freedom of contract and on the right of its citizens to coöperate in the most effective manner in any lawful enterprise, should be as free as the formation of unincorporated associations." Machen, *Modern Law of Corporations*, § 1.

¹⁹ It is true there are some statutory prohibitions which are merely declaratory of the common law, but these should be given no greater effect than the common law. Morawetz, *Private Corporations*, § 658.

²⁰ "Inasmuch as the prohibition of the common law against the unauthorized exercise of corporate power is based upon grounds of public policy alone, it seems but reasonable that the effect of this prohibition upon the legal validity of corporate acts should be determined by the requirements of public policy." Morawetz, *Private Corporations*, § 653.

²¹ Machen, *Modern Law of Corporations*, §§ 284, 291; 20 HARV. L. REV. 457, 465-466.

2. *The analogy of de facto public officers.*

"Urgent considerations of public policy," Mr. Warren says, "have justified courts in giving for the benefit of a person dealing in good faith with a *de facto* officer the same effect to his acts as would be given to the acts of a *de jure* officer." The doctrine of *de facto* public officers is applied for the benefit of "third persons," but does not afford a remedy to the officers themselves. Mr. Warren concludes that to follow the analogy in corporation law would result in a doctrine of *de facto* corporations applied for the benefit of "third persons" but not for the benefit of the corporation. He even goes so far as to admit that a doctrine of *de facto* corporations for the benefit of "third persons" has found a place in the law, but contends that there is no such thing as a distinct doctrine of *de facto* corporations applicable for the benefit of the associates.

It is submitted, however, that the analogy of *de facto* public officers, instead of supporting Mr. Warren's contention, either is an argument against the whole doctrine of *de facto* corporations whether applied for the benefit of "third persons" or of the associates, or else it is an argument in support of the doctrine applied without distinction for the benefit of shareholders or third persons. If we look upon the corporation and the associates as identical, as Mr. Warren does in his treatment of the analogy, we must observe that the doctrine of *de facto* public officers does not extend beyond giving validity to the relations established between others, and has nothing to do with the relation existing between the officer and the persons dealing with him,²² whereas the doctrine of *de facto* corporations consists in giving effect to the relation created between the corporation and others. On the other hand, if we proceed more in harmony with a fundamental conception of corporation law and treat the corporation as an entity distinct from the shareholders, the analogy of *de facto* public officers becomes an argument for the unlimited application of the doctrine of *de facto* corporations. The corporation being distinct from the natural persons of which it is composed, brings into existence relations between outsiders. It is true that the doctrine is nominally applied in favor of the cor-

²² The doctrine of *de facto* public officers gives no remedy to the officers. 20 HARV. L. REV. 458, notes 4 and 5. The one dealing with the officer has no need for the doctrine, as he can rely on the principle of estoppel to protect him.

poration, but substantially its application is for the benefit of innocent shareholders.²³

3. *The argument from estoppel.*

It is the law in the American states that one who has dealt with a corporation *de facto* as a corporation is precluded from taking advantage of the corporation's defective organization. Clearly the doctrine of *de facto* corporations is an easy and adequate explanation for these cases; but some courts in reaching their decisions have given as their reason for so doing "that a contract with a party as a corporation estops the party so contracting to deny the existence of the corporation."²⁴ It is perhaps true that in many cases where such language is used the courts were proceeding "upon a rule of evidence rather than the strict doctrine of estoppel. They have treated the contract with a party by a name implying a corporation, really as evidence of the existence of a corporation more than as an estoppel to disprove such fact."²⁵ No criticism is offered to such cases in their recognition of this rule of evidence; but the idea that a *de facto* corporation is based upon estoppel is confusing and without foundation. In fact, most of the courts of this country which have held to a strict estoppel of one who has dealt with the corporation have not confused the doctrine of estoppel and *de facto* corporations, but in such cases take the position that estoppel and *de facto* incorporation must concur in order to prevent inquiry into the corporation's existence.²⁶

We may have a case in which estoppel *in pais* is to be applied against an individual stockholder or a corporation, but it is a reversal of the usual order of things to apply estoppel against one who has contracted with a corporation to preclude him from denying its *de*

²³ "Note, however, that the doctrine of *de facto* corporations applies in favor of the supposed corporation itself, whereas the doctrine of *de facto* officers does not apply in favor of the officer himself. A reason for this distinction may be found in the fact that the *de facto* corporation is composed of natural persons who may be regarded as innocent third persons, so that when the *de facto* doctrine is applied nominally in favor of the corporation itself it is substantially applied in favor of innocent shareholders." Machen, *Modern Law of Corporations*, § 284, note 2.

²⁴ *Slocum v. Providence Steam & Gas Pipe Co.*, 10 R. I. 112 (1871).

²⁵ *Stoutimore v. Clark*, 70 Mo. 471 (1879); *Jones v. Cincinnati Type Foundry Co.*, 14 Ind. 89 (1860).

²⁶ See cases cited in note 1, *supra*; 1 Machen, *Modern Law of Corporations*, 242; *ibid.* 238, note 4.

jure existence. If a corporation induces A. to enter into a contract with it upon its representation that it is a corporation competent to contract, there would be a clear case for applying the equitable doctrine of estoppel against the corporation and in favor of A. But under the above-stated facts, to apply estoppel against A. and in favor of the corporation is clearly not defensible upon any equitable grounds.²⁷

Mr. Warren points out that the courts are not dealing with ordinary equitable estoppel. He says, "that the one who dealt with the corporation" never represented that the associates were a corporation; "he simply acted on their representation." He calls the principle "the argument *ad hominem*," which he states in this convincing way:

"The associates expected to be shielded, by their possession of the corporate privilege, against unlimited liability for a breach of the contract, and A. [the one who dealt with the corporation] may fairly be charged with knowledge of this. In consenting to contract with them as a corporation, he has, by necessary inference consented to avail himself on a breach of contract of only such remedies as could be used if the associates possessed the corporate privilege."²⁸

The error in this statement arises from making the statement cover two situations which should be kept entirely distinct. In this statement Mr. Warren has covered the case where A. seeks to hold the stockholders individually liable upon the contract he entered into with the corporation and the case where the defectively organized corporation seeks to hold A. on his contract with it. In the first case it is true that the associates expected to be shielded against unlimited liability and that A. may fairly be charged with notice

²⁷ "But many American courts — perhaps we should say, most American courts — go further and hold not only that those who participate in representing to the public that a defectively incorporated company of which they are members is a legally constituted corporation are estopped to deny its corporate character, but also that anybody who deals with them as a corporation is likewise estopped. . . . This conclusion, it is submitted, cannot be justified by the ordinary principles of estoppel *in pais*. For the person or persons in whose favor the estoppel is invoked — that is, the supposed corporation or its members — were not misled by any misrepresentation of the person who is to be estopped. If we assume that whoever deals with a company which claims to be a corporation impliedly represents to it that it is incorporated, yet the supposed company or its members are not misled; for they are better acquainted with the facts than he can possibly be." Machen, *Modern Law of Corporations*, § 282.

²⁸ 20 HARV. L. REV. 475-476.

of this and it would be inequitable to let A. hold the stockholders to individual liability. In this first case Mr. Warren makes the unwarranted assumption that unless we preclude A. from denying the validity of the contract with the corporation he will be able to hold the associates to individual liability. Individual liability of the associates is not a necessary legal consequence of an unsuccessful attempt to incorporate.²⁹ To permit A. to hold the associates to

²⁹ The courts are divided on the question of whether the members of a defectively organized corporation can be held individually or as partners upon the contract. On principle it would seem perfectly clear that they could not be held upon a contract they never made.

"If an association assumes to enter into a contract in its corporate capacity, and the party dealing with the association contracts with it as if it were a corporation, the individual members of such association cannot be charged as parties to the contract, either severally or jointly, or as partners. This is equally true whether the association was a corporation or not, and whether the contract with the association in its corporate capacity was authorized by the legislature or prohibited by law and illegal. The fact that the parties have failed to make a binding contract, as contemplated, because they erroneously supposed that the association was a corporation, or because the agreement actually entered into was prohibited by law and invalid, would certainly not be a reason for treating them as if they had entered into a different agreement which neither of the parties contemplated. If an association undertakes to enter into a contract as a corporation, it is clear that the members of the association do not agree to be . . . bound as partners either to each other or to the party contracting with the association. It is equally clear, that the party contracting with the association does not intend to contract with its members individually. To treat the individual members of the association as parties to the contract, under these circumstances, would therefore involve not only the nullification of the contract which was actually contemplated by the parties, but the creation of a different contract, which neither of the parties intended to make.

"It seems surprising that the authorities should be conflicting upon so plain a proposition. Yet there are numerous cases in which parties have been held by the courts to be liable as partners, upon contracts which were intended to bind them as a corporate association only. In these cases the courts seem to have proceeded on a theory that, if the associates cannot be treated as a corporation, they must necessarily be held liable as partners, irrespective of the agreements actually made. Upon a similar theory, it would follow that, if a contract made on behalf of a legally incorporated company is not binding upon the corporation because in excess of the company's chartered powers, the members of the company would be chargeable individually as partners. This proposition, however, appears never to have received judicial sanction." Morawetz, *Private Corporations*, § 748.

Not only have courts gone astray on the proposition but some legal theorists as well. In Machen's excellent work, *Modern Law of Corporations*, § 293, the author takes the position that where the doctrine of *de facto* corporations is not applicable, the members of a defectively incorporated company should be held to individual liability. He says the authorities which hold that the members are not liable as partners "proceed upon the ground that the several members never intended to assume the position of co-partners and never held themselves out as occupying that relation,

individual liability gives A. a right in contract beyond that for which he contracted, and imposes a contract liability upon the stock-

so that injustice would be done by treating them as such. But this argument, although specious, is believed to be fallacious. Although it is true that the members of the association did not intend to become partners, they did intend to engage in a joint enterprise as an associated body. Now the law knows but two forms of associations for business or trade — corporations and partnerships, and as they are not a corporation they must be a partnership." The error in this reasoning is easily demonstrable. Since, as Machen says, there are only two forms of associations for business known to the law — corporations and partnerships — if persons attempt to form a partnership but are unsuccessful in such attempt, according to his reasoning a corporation must be the result. Of course this is absurd. Again the error in this reasoning will appear by use of another test, *i. e.* whether the association was formed for a purpose of gain or profit. It is primary that to have a partnership it must be organized for purpose of profit. Suppose persons attempt to form a corporation to grade a public street but with no purpose of profit, as was done in the case of *Johnson v. Corser*, 34 Minn. 355, 25 N. W. 799, and fail in their attempt to incorporate. It is impossible to have a partnership as a result, because it lacks that essential characteristic of a partnership — organization for purpose of profit.

In 21 HARV. L. REV. 311-312, Mr. Warren puts a case where "the associates assume to act as a corporation without making any attempt to comply with any law regulating the formation of corporations. They style themselves a corporation, and adopt the forms of procedure usually followed by corporations *de jure*. A. contracts with them as a corporation. On a breach of the contract A. seeks to hold the associates to full liability, and they seek to confine A. to a remedy against the assets, if any, of the corporation.

"A contract, say the associates, is a consensual transaction. Out of a consensual transaction can arise only such obligations as the parties intended to arise. We agreed to be bound as a corporation, but we did not agree to be bound as individuals. To bind us as individuals would be to make a new contract for us. A. must hold us as a corporation, or not at all.

"But, answers A., a man's rights are not necessarily as large as his assertions. Legal incorporation, to be sure, would have shielded the associates from full liability, but they never were legally incorporated. They assumed the corporate shield without authority. What they assumed without authority must be stripped from them.

"It is childish for them to argue that their liability is bounded by their own intent. If they assumed to do an act with limited liability, and they had no authority to limit their liability, then their liability for that act is unlimited. They did not have authority to limit their liability for the act, but that did not prevent the act from being theirs. It is not their liability, but their partial exemption from liability, which fails. They stand exposed to the consequences of their own acts."

Let us restate Mr. Warren's argument, the gist of which he has embodied in syllogistic form in the immediately preceding paragraph. If we substitute for his generalized statement a statement more nearly representative of the transaction under discussion without altering the force of his syllogism, the revised statement will take this form. If the associates assumed to enter into a contract on a corporate basis, and they had no authority to contract on a corporate basis, then they are individually liable on the contract. Clearly the conclusion that they are individually liable on the

holders which they never contracted to assume. Regardless of the *de facto* requisites A. should not be allowed to hold the stockholders to individual liability.

The refusal to permit A. to hold the associates to individual liability is not to be based upon the ground that he has by consenting to contract with the corporation waived a remedy available to him,

contract does not follow from the premises stated, for there is the possibility that there is no liability on the contract at all.

Further on in the same article Mr. Warren says: "The contention that out of a consensual transaction no obligations can arise except such as the parties intended to arise is not sound. The law frequently imposes upon the parties to a consensual transaction certain obligations not covered by their actual, or expressed intent. . . . Thus A. may sell goods to B. and may find that the law imposes upon him a warranty of their quality, although he had no intent to make such warranty. Thus A. may, without authority, assume, as agent of B., to contract with C., and may find that the law imposes upon him personally a liability under the contract.

"The agent does not intend to be bound himself at all, but, if he acts without authority, full liability for the act rests upon him. The associates intend to be bound, but with limited liability. If they are without authority to limit their liability, full liability for the act rests upon them."

Mr. Warren would have us infer that the refusal to hold the associates individually liable on the contract entered into upon a corporate basis is based upon the conception that "no obligation can arise out of a consensual transaction except such as the parties intended to arise." But such an inference is unwarranted, for in the case under discussion, while we think the associates should not be held individually liable on the contract, we believe the law should impose upon the associates "an obligation not covered by their actual or expressed intent." The associates should be held quasi-contractually for the benefits received by them. It is well to observe that the supposedly analogous cases which Mr. Warren evidently considers arguments for holding the associates individually liable on a contract entered into upon a corporate basis, are cited to show that "the law frequently imposes upon parties to a consensual transaction, certain obligations not covered by their actual or expressed intent," and that Mr. Warren cites no cases to show that the law ever substitutes in place of an intended contractual obligation a contractual obligation which both parties to the contract affirmatively intended not to assume. It is true that the law does sometimes impose upon the seller of goods a warranty of quality which the seller did not intend to make. But any words or conduct tending to show that there was an intention of the parties not to warrant will prevent the implication of warranty from arising. See Williston, Sales, § 239. It seems it would be better to cite the case to show that the associates should not be held to individual liability, for contracting on a corporate basis is manifesting an intent not to contract on a basis of individual liability and should therefore prevent the implication of an obligation, intended not to be assumed, from arising. It is also true that the law imposes an obligation not covered by his intent upon the agent who acts without authority. His liability, however, is based upon a matter entirely distinct from the contract. It is based upon an implied warranty of authority, and he should not be held liable on the contract. See Ames' criticism of § 20 of the Negotiable Instruments Law, Brannan's Negotiable Instruments Law, 26.

but rather upon the ground that he never was entitled to hold the associates to individual liability.

In the second case, where the corporation seeks to hold A. on his contract with it, is it correct to say that A., by consenting to contract with the corporation, has by necessary inference consented to avail himself on a breach of the contract of only such remedies as could be used if the associates possessed the corporate privilege, or by contracting has assumed the *de jure* existence of the corporation? A. cannot justly be held to consent to forego remedies the existence of which depends upon circumstances of which he is entirely ignorant. If the corporation is represented to A. to be competent to contract, can it be said that A., induced to enter into a contract with the corporation because of such misrepresentation, has thereby waived his right to object on the ground of such misrepresentation? For example take a parallel case: If A. enters into a contract with an infant, who represents himself to A. to be of age, clearly A. is not bound by the contract.³⁰ The courts have not been so confused in their thinking as to say that by consenting to enter into the contract with the infant A. has thereby consented not to avail himself of any other remedies than those he might use if the infant were of age. How does A.'s consent to contract in the one case involve a waiver of remedies not contained in the other? A.'s consent to contract with the corporation, instead of being an assent to forego any of his remedies arising from its not being a corporation, is merely a manifestation of willingness to rely upon the representation made by certain persons that he is dealing with a corporation competent to contract. If the representations are untrue he should have all the remedies open to him that follow as a consequence of such false representation. In the second case, then, A. seeks to set up a defense which he has never agreed not to use and of which he is allowed to avail himself, unless, of course, there is no such defense existing because the corporation was one *de facto* and therefore competent to contract.

If this "argument *ad hominem*" be sound, it should apply against A. no matter how defective the incorporation, even in cases where the corporation is not *de facto*. For A.'s assent to forego his remedies is not affected by the corporation's competency or incompetency

³⁰ That A. may avoid a contract entered into with an infant on the infant's representation that he was of age, see Williston, Sales, § 26.

to contract. The decisions, however, do not preclude one who has dealt with a corporation lacking the *de facto* requisites, from attacking the corporation's existence.³¹ Mr. Warren recognizes this and says, "It is in this connection that courts make the most important application of the *de facto* conception." He thinks it is fair between the parties that a contract entered into on a corporate basis should be enforced upon the same basis, "but it is against public policy thus to allow parties to create *pro tanto* corporations at their will." Mr. Warren thinks the weight of this argument of public policy decreases as the defectiveness of incorporation decreases until we reach a point where the *de facto* requisites are present, and there the argument of public policy against the validity of the contract is not strong enough to override the argument of fairness between the parties and the contract is therefore given validity. It is to be observed that Mr. Warren thinks that public policy and fairness between the parties are opposing considerations and that public policy is against the enforcement of contracts made by a defectively organized corporation, while the consideration of fairness between the parties is in favor of their validity. This is certainly an ingenious excuse for the "argument *ad hominem*," but is it not fallacious to assume that these considerations are uniformly opposed to each other and that fairness always requires a contract entered into by A. with a defectively organized corporation to be enforced against A.? Where A. is prejudiced by relying upon the representation of the associates that they are a corporation, it is difficult to see where fairness between the parties requires that he should be held to his contract with the corporation. Suppose that A. should take out a policy of insurance with a corporation upon representations that the company was incorporated where he would be protected by a large capital stock, and suppose no articles of incorporation had been taken out or stock subscribed. Is it not absurd to say that since A. was willing to rely upon the representations that the company was an insurance corporation and to enter into a contract upon that basis, fairness demands that the corporation be allowed to hold him to his contract? Instead of standing opposed to public policy, it seems the consideration of fairness between the parties, if it is distinct from the consideration of public policy, combines with it to support the validity of a contract with a corporation *de*

³¹ See note 11, *supra*.

facto and to oppose the enforcement of a contract with an association which has completely or largely failed to comply with the statute of incorporation.

4. *The stock-subscription and eminent-domain cases.*

Where there has not been dealing on a corporate basis with the *de facto* corporation, the courts regularly reach a result explainable by the unrestricted doctrine of *de facto* corporations alone; but there are two classes of cases in this group in which the *de facto* corporation does not stand so well as the corporation *de jure*. These cases are cited to show that the doctrine of *de facto* corporations breaks down when there is no basis for invoking estoppel. One class of cases is where A. takes and agrees to pay for shares of stock in a corporation to be formed, and the other is where a *de facto* corporation attempts to exercise the power of eminent domain. In the first group, if only a *de facto* corporation is formed, it cannot compel A. to take and pay for his stock, and in the second group the owner may prevent the *de facto* corporation from taking his land by condemnation.

Mr. Warren cites these cases as examples of refusals by the courts to apply the doctrine "in favor of the associates themselves, to the prejudice of a person who has not dealt with them as a corporation."³² It is submitted that in neither case are the courts refusing to apply the doctrine of *de facto* corporations. The doctrine does not involve the idea that the corporation *de facto* is equivalent to the corporation *de jure*. The corporation *de facto* may have its charter annulled by the state upon a ground that does not obtain in the case of the *de jure* corporation, *i. e.* that of failing to comply with the statute. A man purchasing stock would have reason for preferring a corporation *de jure* to one *de facto*, even where the *de facto* doctrine is ostensibly applied without limitation. If he contracted to take shares in a corporation *de jure* he would have substantial grounds to refuse a tender of shares in a corporation *de facto*. Now a person who contracts to take shares in a corporation to be formed contracts for shares in a corporation to be formed legally, *de jure*. The courts refuse to permit the corporation to hold A. liable on his contract because the corporation has not performed a condition precedent to A.'s liability on the contract, and

³² 20 HARV. L. REV. 472.

not because they refuse to recognize the legal existence of the corporation. This may be illustrated by supposing the case arose in a state where the *de facto* doctrine is provided for by statute.³³ Is it not clear that the *de facto* corporation in such state should not be permitted to hold A. on his contract? It is not a refusal by the courts to apply the *de facto* doctrine, but is simply an application of a well-established principle of contracts.

No corporation can condemn land unless it is expressly authorized by the statute. This power of exercising eminent domain is the highest attribute of sovereignty that the state can grant. If a statute confers upon a class of corporations the privilege of exercising this extraordinary power, the statute is properly construed as conferring that power only upon those corporations which have substantially complied with the statute of incorporation.³⁴ Again, it is not a refusal to apply the *de facto* doctrine but is merely interpreting the statute granting the power of eminent domain.

To summarize:

The *de facto* corporation is one which has failed to comply with the conditions precedent to incorporation prescribed by the legislature, but has complied with certain technical requisites laid down by the courts. The *de facto* doctrine does not mean that the *de facto* corporation is just as good legally as the *de jure* corporation except as against the state. The *de facto* doctrine consists, rather, in holding the corporation *de facto* equivalent to the corporation *de jure* except for the legal differences that necessarily arise from

³³ California, North Dakota, South Dakota, and perhaps other states provide for the *de facto* doctrine by statute. 20 HARV. L. REV. 468, note 20.

³⁴ "The power of condemning land for public purposes belongs to the state alone. No person or corporation, whether it be a legally formed corporation or not, can exercise this power unless expressly authorized to do so. Hence, if a statute conferring the power to condemn land is intended by the legislature to apply only to legally formed corporations, a corporation which has not been legally formed can derive no authority from it; and an attempt on the part of such a company to exercise the power will have no greater validity than if the statute had never been passed. A statute purporting to confer the power of condemning land upon railroad companies incorporated under the laws of the state, is clearly intended to apply to legally incorporated companies only. It is not intended to apply to self-constituted corporations having no legal right to exist; and there seems to be no reason for applying a different rule in favor of companies which undertook to become incorporated according to law, but failed to comply with the forms prescribed by law as conditions precedent to a legal incorporation." Morawetz, Private Corporations, § 768.

the fact that the corporation *de facto* may have its charter annulled by the state for failing to incorporate according to statutory requirements. The doctrine is based upon reason and justice and in the form stated above, though it may discord with many of the *opinions* of the courts, harmonizes with practically all of the American *decisions*, and furnishes a clear-cut and adequate explanation of them.

On the other hand, the contrary view that the doctrine of *de facto* corporations is to be used only in conjunction with other legal principles or when the exigencies of the particular case demand it, is unsatisfactory. The necessity to search for and to find in each case some "extenuating circumstance" to justify the doctrine's application is cumbersome and superfluous. Furthermore, this view which limits the *de facto* doctrine is not sustained by the arguments used to support it. These arguments are either *per se* indefensible, or support rather than oppose the unrestricted application of the *de facto* doctrine.

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CONTROL OF PATENTEE OVER UNPATENTED COMMODITIES. — That a patentee may control the market in unpatented commodities to some extent, the Supreme Court recently decided¹ by holding valid a restriction that patented mimeographs sold, be used only with supplies of the patentee's production. *Henry v. A. B. Dick Co.*, U. S. Sup. Ct., March 11, 1912.

Can a patentee sell a patented article, passing complete title, and restrict its use thereafter? The patent statute does not give such right expressly.² So this is a question of statutory construction.³ Though the danger that the patentee will establish a monopoly in unpatented commodities, illegal under the Anti-Trust Act, is no argument for holding every restriction void, since such restrictions would be void in any event, the possibility of harsh conditions for purchasing unpatented articles, though in themselves lawful under the Anti-Trust Act, might lead to denying altogether the right to impose conditions. The common law, moreover, is prejudiced against restraints on the alienation of chattels.⁴ No property interests in them can be reserved to the seller who passes

¹ Affirming 149 Fed. 424. The case follows a long line of lower federal-court decisions. The leading case is *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 77 Fed. 288. But the question was considered open in the Supreme Court. See *Courtelyou v. Johnson & Co.*, 207 U. S. 196, 28 Sup. Ct. 105; *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 346, 28 Sup. Ct. 722, 724.

² U. S. COMP. STAT., 1901, § 4884, gives the patentee "the exclusive right to make, use, and vend the invention or discovery."

³ This makes a case for federal jurisdiction, since the suit was for infringement. *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.*, 185 U. S. 282, 22 Sup. Ct. 681.

⁴ See *Park & Sons Co. v. Hartman*, 153 Fed. 24, 39. But see 17 HARV. L. REV. 416.

title and possession.⁵ Covenants,⁶ and equitable servitudes⁷ do not run with chattels. So the copyright statute,⁸ was strictly construed, and the copyright-holder cannot fix prices of books he has once sold.⁹ The language in some cases would justify similar strict construction of the patent statute.¹⁰ But the patentee is given three distinct exclusive rights.¹¹ None may make, or use, or vend the invention without his permission. He need not use, nor permit others to use.¹² He may grant permission on the most fanciful terms,¹³ to one to make only, another to use only,¹⁴ another solely to vend.¹⁵ Of course, in the ordinary sale, permission to use is implied.¹⁶ This permission, however, and not the passing of title "takes the article out of the patent monopoly." That the user has title is immaterial. The defiant infringer has title to the machine which he constructs. So if the patentee expressly conditions his permission when he sells, user in excess of permission must constitute infringement.¹⁷ The principal case reaffirms that the patentee's rights to exclude are separable.

But the validity of the actual condition imposed is a distinct question. Obviously, the patentee may not impose any condition whatever, such as committing murder. The patent statute gives only the right to exclude others from "making, using, and vending the invention." It gives no right to sell the article, or to make contracts concerning it. These rights the patentee already had. The validity of his contracts then, and the conditions which he imposes, are subject to the law of the land.¹⁸ Thus,

⁵ See BENJAMIN, SALES, 6 ed., 746.

⁶ *Smith v. Williams*, 117 Ga. 782, 45 S. E. 394.

⁷ *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376; *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 619.

⁸ U. S. COMP. STAT., 1901, § 4952, gives "the author the sole liberty of printing, reprinting . . . and vending."

⁹ *Bobbs-Merrill Co. v. Straus*, *supra*. The right to vend was held to be tied up in and incidental to the right to multiply copies.

¹⁰ See *Keeler v. Standard Folding-Bed Co.*, 157 U. S. 659, 666, 15 Sup. Ct. 738, 741; *Bloomer v. McQuewan*, 14 How. (U. S.) 539, 549.

¹¹ See *Adams v. Burke*, 17 Wall. (U. S.) 453, 456.

¹² *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, 28 Sup. Ct. 748. This seems a defect in our present law. That the invention will be made of some immediate benefit to the public should be a condition in the patent grant. In England, licenses on reasonable terms are made compulsory. PATENTS AND DESIGNS ACT, 1907 (7 EDW. 7, c. 29), § 24 (3).

¹³ See *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, 154 Fed. 358, 362.

¹⁴ *Rubber Co. v. Goodyear*, 9 Wall. (U. S.) 788.

¹⁵ See ROBINSON, PATENTS, § 813; WALKER, PATENTS, 4 ed., § 296.

¹⁶ *Hartshorn v. Day*, 19 How. (U. S.) 211; *Bloomer v. McQuewan*, *supra*. Even where the licensee, authorized to make unconditional sales, may sell in one state only, the purchaser gets full permission to use and vend in other states reserved to the patentee and assigned to another. *Adams v. Burke*, *supra*; *Keeler v. Standard Folding Bed Co.*, *supra*. But an unconditional sale in a foreign country gives the purchaser no permission to use in this country. *Boesch v. Gräff*, 133 U. S. 697, 10 Sup. Ct. 378. Or to vend. *Daimler Mfg. Co. v. Conklin*, 170 Fed. 70, *certiorari* denied, 30 Sup. Ct. 575.

¹⁷ *Mitchell v. Hawley*, 16 Wall. (U. S.) 544, is a precise precedent for the holding in the principal case on this point. The restraint on alienation thus involved is not an equitable servitude running with the chattel. The patentee claims no property right in it. Simply, no chattel embodying the invention can be used without permission, whether purchased from the patentee or not. Moreover, the objection to restraint on the alienation of the patented chattel could be easily avoided by conditional sales, or leases.

¹⁸ See *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, *supra*, 293.

the state in exercising police power may require the contract to be recorded.¹⁹ Similarly, if the patentee makes an unconscionable bargain it will not be enforced.²⁰ The question here is, whether under the general law of restraint of trade the contracts, excluding competition in unpatented supplies, are illegal; not whether restrictions on use of patented articles may be imposed. By no possible construction of the patent right to exclude others from the invention, can an illegal monopoly in ordinary commodities be justified.²¹ The principal case, then, is a holding that the monopoly in the unpatented supplies was reasonable.

What is a monopoly that restrains trade unduly, is yet to be determined by the cases. The principal case presents a phase of the mooted problem whether monopoly maintained without unfair exclusion of competitors is lawful.²² A single contract to buy supplies from one only is lawful.²³ But if the supplies are suitable for use only with mimeographs, a system of contracts with all mimeograph users monopolizes that market.²⁴ The public injury, a question of degree for each case, is the first consideration in determining whether the monopoly is reasonable.²⁵ The public as buyers are said not to be affected, for they need not buy if the price becomes too high. Any trade which the public as sellers had before the patent may now be as untrammelled as ever. The question, in light most favorable to the patentee, reduces to whether the public is entitled to competition in a market which the patentee alone created. The recent proprietary medicine cases, where the maker created his own market, answered that that was no excuse for thereafter controlling it.²⁶ The general monopoly control, the stifling of potential competition of cheaper and better supplies, for no better reason than the power to do so, seems to be the objectionable feature.²⁷

¹⁹ *Allen v. Riley*, 203 U. S. 347, 27 Sup. Ct. 95.

²⁰ *Pope Mfg. Co. v. Gormully*, 144 U. S. 224, 12 Sup. Ct. 632. Elements of a hard bargain led the minority in the principal case to think it should be placed under this doctrine.

²¹ *United States v. Standard Sanitary Mfg. Co.*, 191 Fed. 172. See 25 HARV. L. REV. 454.

²² See 25 HARV. L. REV. 73. Holmes, J., thought the essence of monopoly was unlawful exclusion of competition by a combination. See *Northern Securities Co. v. United States*, 193 U. S. 197, 409, 24 Sup. Ct. 436, 471.

²³ *Garden City Sand Co. v. Lanyon*, 223 Ill. 616, 79 N. E. 313; *Ferris v. American Brewing Co.*, 155 Ind. 539, 58 N. E. 701. But if designed to monopolize, the contract is invalid. *Barataria Canning Co. v. Jouliau*, 80 Miss. 555, 31 So. 961. Similarly, though one restriction on the use of land sold that it be not used for liquor selling is reasonable, if it tends toward monopoly, it is invalid. *Burdell v. Grandi*, 152 Cal. 376, 92 Pac. 1022; *Chippewa Lumber Co. v. Tremper*, 75 Mich. 36, 42 N. W. 532.

²⁴ If the supplies are not of special kind, a closer case seems presented, for then total monopoly is not built up. But the chief dissent in the lower federal courts from the doctrine of the *Button-Fastener* case, *supra*, came in declining to apply it to ordinary commodities. *Cortelyou v. Johnson & Co.*, 145 Fed. 933.

²⁵ See *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 406, 31 Sup. Ct. 376, 384; *United States v. Standard Oil Co.*, 221 U. S. 1, 60, 31 Sup. Ct. 502, 516.

²⁶ *Dr. Miles Medical Co. v. Park & Sons Co.*, *supra*; *Hill Co. v. Gray & Worcester*, 163 Mich. 12, 127 N. W. 803. Cases *contra* in the federal courts had gone on the ground that the public was just as well off as before the proprietary medicines were produced. *Dr. Miles Medical Co. v. Platt*, 142 Fed. 606. That the article is not of prime necessity does not make the restraint reasonable. *Nester v. Continental Brewing Co.*, 161 Pa. St. 473, 29 Atl. 102. Nor that the amount of trade restrained is small as compared with the total trade. *Montague & Co. v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307.

²⁷ See *Addyston Pipe & Steel Co. v. United States*, 85 Fed. 271, 282, *aff'd* in 175 U. S.

INITIATIVE AND REFERENDUM. — The question whether a law enacted by a reference to the people is void under the various state constitutions, has been repeatedly before the courts. Although the authorities are in conflict, the prevailing view appears to be that such a reference involves a delegation of legislative power and is, in consequence, void.¹ In seven states, because of constitutional amendments, this question can no longer arise.² These amendments have been attacked in the state courts on the ground that they cause the state government to become unrepresentative³ in form and therefore violate the guarantee⁴ of the Federal Constitution. The state courts have, however, sustained these amendments.⁵ In a recent case the Supreme Court of the United States refused to review such a decision and dismissed the case for want of jurisdiction, saying that the enforcement of the constitutional guarantee was for Congress and not for the courts. *Pacific States Tel. & Tel. Co. v. Oregon*, U. S. Sup. Ct., Feb. 19, 1912.

The case is significant in that the court declined jurisdiction. The mere fact that a political question was involved will not explain this ruling. A political question is a question of fact⁶ which may arise in any kind of case and has no bearing on the jurisdiction of the court. The rule is merely that, instead of examining such a question on its merits or submitting it to a jury, the court will, if possible, find out how the political departments of government have decided it, and will then follow that decision.⁷ Such questions may relate, for example, to boundaries,⁸ to the admission of aliens,⁹ to the recognition of state¹⁰ and foreign governments.¹¹ In such cases, if no answer can be found, the court itself must treat it as any other question of fact, for the case before it must be concluded.¹² Many cases involving political questions have been decided by the Supreme Court.¹³

211, 20 Sup. Ct. 96. The *Dr. Miles* case is easily distinguishable in its facts. See 25 HARV. L. REV. 456. Competition in reselling was there cut off. But the consumers are injured in the principal case also, for prices of mimeograph work will be higher.

¹ *Barto v. Himrod*, 8 N. Y. 483; *Rice v. Foster*, 4 Har. (Del.) 479; *Santo v. State*, 2 Ia. 165. See also *Parker v. Commonwealth*, 6 Pa. St. 507; *State v. Copeland*, 3 R. I. 33. But see *contra*, *State v. Parker*, 26 Vt. 357; *Smith v. City of Janesville*, 26 Wis. 291. It is clear that without a constitutional amendment, a reference cannot be demanded by the people.

² By constitutional amendment, the initiative and referendum have been adopted in California, Maine, Michigan, Missouri, Montana, Oklahoma, and Oregon.

³ For a discussion of the meaning of "representative," see 24 HARV. L. REV. 141.

⁴ "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature or of the Executive (when the Legislature cannot be convened) against domestic Violence." U. S. CONST., ART. IV, § 4.

⁵ *Kaddery v. Portland*, 44 Or. 118, 74 Pac. 710.

⁶ See WILLOUGHBY, THE CONSTITUTION, § 577. All questions raised in a case are questions of fact except those that relate to the law of the jurisdiction in which the case is tried. For example, a foreign law is a fact.

⁷ See 22 HARV. L. REV. 132.

⁸ *Williams v. Suffolk Ins. Co.*, 13 Pet. (U. S.) 415.

⁹ See 22 HARV. L. REV. 221, 360-366.

¹⁰ *Luther v. Borden*, 7 How. (U. S.) 1.

¹¹ *Rose v. Himely*, 4 Cranch (U. S.) 241.

¹² See *Ex parte Cooper*, 143 U. S. 472, 12 Sup. Ct. 453, 508.

¹³ *Texas v. White*, 7 Wall. (U. S.) 700. See especially the dissenting opinions in *Taylor v. Beckham*, 178 U. S. 548, 20 Sup. Ct. 890.

The jurisdiction of the Supreme Court turns on a different question. By the Judiciary Act,¹⁴ the Court is required to take jurisdiction of all cases decided in the highest courts of the various states in which the validity of a state statute was drawn in question on the ground of its repugnancy to the Constitution of the United States, and in which the decision was in favor of its validity. Obviously such a statute could be repugnant only to those clauses in the Constitution that limit state action. An appeal to any other clause would be dismissed for want of jurisdiction. In this respect, the Constitution has a fourfold aspect: (1) Some of its clauses deal with the surrender by the sovereign states of certain of their rights;¹⁵ (2) other clauses merely give Congress the power to supersede the state laws on certain subjects;¹⁶ (3) still other clauses deal only with the internal management of the central government;¹⁷ and (4) finally still other clauses can be regarded only as forming a treaty between the sovereign states, beyond the power of the central government to enforce.¹⁸ Federal questions, directly involving the Constitution of the United States, can arise in the state courts only when some clause in the first of the four classes is brought in question, that is, when it is alleged that the state is attempting to do that which, by adopting the Constitution, it forever gave up the right to do. Therefore, by declining jurisdiction, the Supreme Court has conclusively shown that the federal guarantee of a republican form of government is not a direct limitation upon state action. In this sense it may be compared to the clause authorizing Congress to establish uniform laws on the subject of bankruptcy throughout the United States. Until Congress moves, each state remains quite free to enact its own bankruptcy laws. It follows then as a necessary consequence from the principal case that until Congress acts, each state is quite free, as far as the federal judiciary is concerned, to adopt any form of government, republican or unrepugnant in character.

Difficult questions may arise if Congress attempts, by legislation, to regulate the state governments. It would then be the duty of the court to decide (1) whether such acts were authorized by this guarantee; and if so, (2) whether Congress or the court shall define the limits of this

¹⁴ U. S. REV. STAT., 1878, tit. XIII, c. 11.

¹⁵ Familiar examples are the right to pass *ex post facto* laws, and the right to impair the obligation of contract. U. S. CONST., Art. I, § 10. And also the rights surrendered by the Fourteenth Amendment. These clauses are self-executing, and thereby become the supreme law of each state. *Dodge v. Woolsey*, 18 How. (U. S.) 331.

¹⁶ Under these clauses the acts of Congress become the supreme law of each state. The Constitution is involved only in the question whether these acts themselves are constitutional. The usual examples are the power of Congress to regulate interstate commerce and bankruptcy.

¹⁷ The first ten amendments are striking examples.

¹⁸ "A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." U. S. CONST., Art. IV, § 2. The Supreme Court has refused to issue a *mandamus* to the governor of the state and intimated that Congress has no authority to compel him to deliver up a fugitive from justice. See *Kentucky v. Dennison*, 24 How. (U. S.) 66, 109. But under another clause it has been held that Congress has power to pass fugitive slave laws. *Alderman v. Booth*, 21 How. (U. S.) 506.

power, that is, define "republican." From the language in the principal case it would seem that the court would support all measures declared by Congress necessary to maintain republican forms of government among the states.¹⁹

LIABILITY OF MUNICIPAL CORPORATIONS FOR NEGLIGENCE. — Three functions of a municipal corporation can be distinguished: governmental; municipal; and commercial.¹ In exercising the last of these the municipal corporation is clearly as liable for negligence as a private corporation; in the first, where it is performing as agent duties which the state has undertaken, such as preservation of the peace, by almost universal authority it is protected from liability as is the sovereign itself.² It is in the case of its municipal functions, consisting of activities carried on primarily for the benefit of the inhabitants of that particular city, that the law is yet chaotic. The correct view, it is submitted, is to impose liability.

Negligent injury may result from the use of property or acts of persons. As to property used for municipal functions, the municipality should be held to the same duty of care as in its private functions. The city has entered into relations which are within the scope of private law, — control and ownership of property, — and it should be subject to the obligations usually attending such relations.³ It is true that the property is held for a public purpose; but in its municipal functions the corporation is not acting as an agent of the government and hence is not clothed with sovereignty. Why should one injured by a defect in a fire-engine house be differently treated from one injured in a municipal powerhouse? Justice demands a remedy for each; in each case allowing an action will furnish an incentive to greater efficiency in city administration; and though one activity is technically conducted for profit, both are in fact carried on for the benefit of the inhabitants of the municipality.

The second way in which the municipality might be liable is for the torts of its negligent agents.⁴ It has been urged, however, that the doctrine of *respondet superior* should not apply in the exercise of municipal functions, on the ground that this principle of agency is never properly employed except in business dealings, and the analogy of charitable institutions is suggested. While various reasons for the rule of *respondet superior* have been given, in last analysis the explanation is ex-

¹⁹ "The issues presented, in their very essence, are, and have long since by this court been, definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not therefore within the reach of judicial power." See *Pacific States Tel. & Tel. Co. v. Oregon*, U. S. Sup. Ct., Feb. 19, 1912.

¹ This analysis, which is not clearly recognized by the cases or text-books, has been advocated by Professor Joseph H. Beale.

² See DILLON, *MUNICIPAL CORPORATIONS*, 5 ed., §§ 1666, 1626-1636.

³ See GOODNOW, *MUNICIPAL HOME RULE*, cc. 7, 8. The author has suggested applying this principle even to governmental functions, but there is scarcely any authority supporting this view.

⁴ No question of agency arises when the city is held for breach of "the duty of occupiers of fixed property to have it in reasonably safe condition." See POLLOCK, *TORTS*, 8 ed., 74, 75.

pediency; it is socially desirable to hold one who employs and controls another responsible for the torts of that other if in the course of the employment.⁵ Profit is immaterial,⁶ and the exception of a charitable institution is based on a special ground.⁷ Where followed, it has been limited so as to operate only against beneficiaries,⁸ it does not apply to religious societies,⁹ and the minority decisions refusing to recognize the exception at all are perhaps preferable.¹⁰ The rule of *respondet superior* would seem, therefore, logically applicable to municipal functions. Its inherent justice¹¹ is as strong in their case as in that of commercial functions; and no distinction between the two seems possible on the ground of expediency.¹²

The authorities on this subject are conflicting. Municipal corporations are generally held for negligent defects in streets and bridges,¹³ but not in New England. *Dyer v. City of Danbury*, 81 Atl. 958 (Conn.).¹⁴ The general exemption of quasi-municipal corporations from liability in respect to highways may be explained on the ground that in their case the duty is purely governmental; the state needs roads, and the county is its agent in caring for them. City streets, however, have peculiar and local uses, primarily for the benefit of the inhabitants of the city rather than of the state as a whole.¹⁵ In other municipal functions the liability of the corporation has not been generally recognized. It is submitted, however, that the cause thereof is the failure to make the often difficult yet sound distinction between governmental and municipal functions. The law on this question being still unsettled, it may be hoped that this distinction may ultimately be consistently made.¹⁶

⁵ See POLLOCK, ESSAYS IN JURISPRUDENCE, 114-131; DICEY, LAW AND PUBLIC OPINION IN ENGLAND, 280, note.

⁶ POLLOCK, *id.* 126.

⁷ For a discussion of this reason, see 42 CHIC. LEG. N. 122; 22 HARV. L. REV. 228.

⁸ *Hewett v. Woman's Hospital Aid Association*, 73 N. H. 556, 64 Atl. 190.

⁹ *Mulchey v. Methodist Religious Society*, 125 Mass. 487; *Bruce v. Central M. E. Church*, 147 Mich. 230, 110 N. W. 951.

¹⁰ *Kellogg v. Church Charities Foundation of Long Island*, 128 N. Y. App. Div. 214, 112 N. Y. Supp. 566.

¹¹ See Professor Wigmore, 7 HARV. L. REV. 405. The present tendency towards Workmen's Compensation Acts shows the conformity of the rule to modern ideas of social justice.

¹² Many cases in apparent conflict with this conclusion are explicable on the ground that the seeming agent is really an officer of the state. See *Johnson v. City of Somerville*, 105 Mass. 370, 377, 81 N. E. 268, 272.

¹³ See DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 1690. Although generally the city has not ownership of the streets, but an easement and exclusive control, the distinction is but a formal one, and this class of cases can be properly put on the ground of the city's ownership and control of property, the first category suggested.

¹⁴ See DILLON, MUNICIPAL CORPORATIONS, § 1691. The expediency of the majority rule is illustrated by the fact that in New England a liability almost as broad has been imposed by statute. The principal case holds that such a statute does not refer to injuries caused by the falling of a rotten tree-limb. See *Hewison v. City of New Haven*, 34 Conn. 136, 143. *Contra*, *Chase v. City of Lowell*, 151 Mass. 422, 24 N. E. 212. The duty at common law, recognized by the majority rule, seems to include such an injury. *McGarren v. City of New York*, 89 N. Y. App. Div. 500, 85 N. Y. Supp. 861.

¹⁵ See DILLON, MUNICIPAL CORPORATIONS, §§ 1714-1716.

¹⁶ In the following cases the city was held either for negligent defects in its property or for the negligence of its agents: *Bowden v. Kansas City*, 69 Kan. 587, 77 Pac. 573 (fire engine house); *City of Lafayette v. Allen*, 81 Ind. 166 (fire engine); *Ching v.*

LIABILITY OF MUNICIPAL CORPORATIONS FOR TORTS IN ULTRA VIRES UNDERTAKINGS. — The rule of *respondeat superior*, in so far as it is affected by the doctrine of *ultra vires*, is more restricted in its application to municipal than to private corporations. As with a private corporation, the mere fact that a city is never authorized to commit a tort does not relieve it of liability for the wrongful acts of its agents; and where such an act is done in the course of an authorized undertaking, a municipal corporation is liable,¹ subject to the doctrine of governmental functions.² Nor is it a defense that the conduct of the project is beyond the powers of the particular officers,³ or that certain formalities were omitted,⁴ as long as the project itself is *intra vires* the corporation. If, however, the whole undertaking is *ultra vires*, this bars any action for a tort committed by persons therein employed, and no amount of acquiescence can extinguish the right to maintain this defense.⁵ This strict doctrine is illustrated in a recent case. *City of Radford v. Clark*, 73 S. E. 571 (Va.). A contrary doctrine has been asserted in several cases where the *ultra vires* act resulted in obstructing the highway.⁶ The liability, however, of the municipality might be based on the breach of the city's undoubted duty to maintain its streets in a safe condition,⁷ and therefore these cases cannot be regarded as authorities opposed to the universal rule of non-liability for torts committed in an *ultra vires* undertaking.⁸

The underlying principle of this strict doctrine may be more easily ascertained by considering the law as respects the *ultra vires* contracts of municipal corporations. Here, too, the doctrine is far stricter than that applied to private corporations.⁹ The *ultra vires* contracts of a city are generally void and incapable of ratification.¹⁰ Yet, in some few cases, when substantial benefits have accrued to either party, the law gives effect to the *ultra vires* acts of the corporate officers. Where the fact upon which depends the authority to borrow money is not easily ascertainable by the outsider,¹¹ or the money borrowed has been received into the city treasury and applied to corporate uses,¹² the city is bound

Surrey County Council, [1909] 2 K. B. 763 (school playground); *Carey v. Kansas City*, 187 Mo. 715, 86 S. W. 438 (park); *City of Denver v. Spencer*, 34 Colo. 276, 82 Pac. 590 (park); *City of Denver v. Davis*, 37 Colo. 370, 86 Pac. 1027 (garbage dump); *Quill v. Mayor, etc. of New York*, 36 N. Y. App. Div. 476, 55 N. Y. Supp. 889 (garbage wagon); *Missano v. Mayor, etc. of New York*, 160 N. Y. 123, 54 N. E. 744 (garbage wagon).

¹ *Missano v. Mayor, etc. of New York*, 160 N. Y. 123, 54 N. E. 744.

² *Elliott v. City of Philadelphia*, 75 Pa. St. 347.

³ *Norton v. City of New Bedford*, 166 Mass. 48, 43 N. E. 1034.

⁴ *Langley v. City Council of Augusta*, 118 Ga. 590, 45 S. E. 486.

⁵ *Cooper v. Mayor, etc. of Athens*, 53 Ga. 638; *Horn v. Mayor, etc. of Baltimore*, 30 Md. 218; *Wheeler v. Essex Public Road Board*, 39 N. J. L. 291.

⁶ *Cohen v. Mayor, etc. of New York*, 113 N. Y. 532, 21 N. E. 700; *Stanley v. City of Davenport*, 54 Ia. 463, 2 N. W. 1064, 6 N. W. 706; *Pettit v. Incorporated Town of Grand Junction*, 119 Ia. 352, 93 N. W. 381.

⁷ *Bourget v. City of Cambridge*, 159 Mass. 388, 34 N. E. 455; *Koch v. City of Williamsport*, 195 Pa. St. 488, 46 Atl. 67.

⁸ *Cf. Shinnick v. City of Marshalltown*, 137 Ia. 72, 114 N. W. 542.

⁹ *Cf. Bissell v. Michigan Southern and Northern Indiana R. Cos.*, 22 N. Y. 258.

¹⁰ *Ottawa v. Carey*, 108 U. S. 110, 2 Sup. Ct. 361; *Cleveland School Furniture Co. v. City of Greenville*, 146 Ala. 559, 41 So. 862; *City of Somerville v. Dickerman*, 127 Mass. 272.

¹¹ *Hackett v. Ottawa*, 99 U. S. 86.

¹² *Thomson v. Town of Elton*, 109 Wis. 589, 85 N. W. 425. If a city has power to

by the acts of its officers. And, if a contract has been partly performed, an action for breach thereof may be maintained against the city, notwithstanding the consideration promised was beyond the powers of the city to give.¹³ For the same reasons a city cannot escape liability for revenue taxes where it engages in the business of distilling and increases its assets with profits from the *ultra vires* transaction.¹⁴

Accordingly it seems clear that, within certain limits, a municipal corporation, like a private corporation,¹⁵ may have agents for *ultra vires* purposes whose acts may be the foundation of legal rights and liabilities. Hence, the strict doctrine of *ultra vires*, applied to these bodies, must rest on motives of policy,¹⁶ rather than on the lack of any legal principle to identify the corporation with the acts of its agents. That this policy rests on sound considerations, in its general application, seems equally clear. In contracts, the burden should be on the outsider to ascertain the corporate powers,¹⁷ and in other cases the taxpayers should not bear the burdens of the unauthorized acts of their officers.¹⁸ When, however, the *ultra vires* transaction is productive of some benefit, pecuniary or otherwise, which the corporation accepts, and at the same time causes an injury to some innocent individual, the policy of the law might well be altered. The same considerations are applicable by which public corporations are denied the immunity of governmental agencies when an *intra vires* act is of peculiar benefit to the inhabitants;¹⁹ and, moreover, considerations of justice to the injured party might well justify in some cases the imposition of liability upon municipal corporations for torts of their agents committed in *ultra vires* undertakings.

RES JUDICATA IN PATENT CASES. — As the circuit courts are not bound by each other's precedents,¹ it sometimes happens that the same patent is held invalid or not infringed by a certain device² in one circuit, and

purchase gas, no question of *ultra vires* is raised in a suit to recover the value of gas supplied, though the contract under which it was furnished was *ultra vires*. *City of East St. Louis v. East St. Louis Gas, Light, and Coke Co.*, 98 Ill. 415.

¹³ *Hitchcock v. Galveston*, 96 U. S. 341. It is difficult to understand the reasoning of the court, that it is enforcing the contract only in so far as it is *intra vires*. If an outsider has received benefits under an *ultra vires* contract, the city may have an action for breach thereof. *Town of Monticello v. Cohn & Kuhn*, 48 Ark. 254, 3 S. W. 30.

¹⁴ *Salt Lake City v. Hollister*, 118 U. S. 256, 6 Sup. Ct. 1055. Whatever bearing this case may have on *ultra vires* torts, it clearly stands for the proposition that the corporation, as such, was subject to a tax.

¹⁵ See *Bissell v. Michigan Southern and Northern Indiana R. Cos.*, *supra*, 284.

¹⁶ See 4 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 1654, note 3.

¹⁷ *State ex rel. City of St. Paul v. Minnesota Transfer Ry. Co.*, 80 Minn. 108, 83 N. W. 32; *Hope v. City of Alton*, 214 Ill. 102, 73 N. E. 406.

¹⁸ *Mayor, etc. of Albany v. Cunliff*, 2 N. Y. 165; *Wheeler v. Essex Public Road Board*, *supra*. See *Bradley v. Ballard*, 55 Ill. 413, 420.

¹⁹ *Hourigan v. City of Norwich*, 77 Conn. 358, 59 Atl. 487; *Hodgins v. Bay City*, 156 Mich. 687, 121 N. W. 274.

¹ *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485, 20 Sup. Ct. 708.

² It is immaterial as to the questions discussed in this note upon which ground the decree for the defendant is placed. See *Rubber Tire Wheel Co. v. Goodyear Tire & Rubber Co.*, 183 Fed. 978, 983.

valid and infringed by an identically similar device in another circuit.³ If the first decision is not appealed from, and the second is affirmed on *certiorari* to the Supreme Court,⁴ so that it becomes the law in all the circuits⁵ that the patent is valid and covers the device in question, just what is the effect of the first judgment?

The Supreme Court has held that a judgment in favor of an alleged infringer gives him the right to enjoin the patentee from suing his customers for infringement.⁶ The case is but an application of the well-established doctrine of *res judicata* that a judgment estops the defeated party from denying, in any suit between the parties or their privies, any fact established by the judgment.⁷ The defendant, being estopped, as against this complainant, from setting up his patent right, cannot justify his interference with the complainant's business, and is therefore rightly enjoined. The court expressly left open the question whether a purchaser of an infringing article from the infringer who had the decree in his favor could use this decree as a defense if sued by the patentee.⁸ A circuit court has answered the question in the negative. *Hurd v. Seim*, 189 Fed. 591 (Circ. Ct., N. D. N. Y.); *Hurd v. Woodward Co.*, 190 Fed. 28 (Circ. Ct., N. D. N. Y.).⁹ The case is now pending before the Supreme Court.¹⁰

In considering the question, it is important to notice that the title to an article, and the right to use the article without interference from a patentee are distinct and separate rights.¹¹ Anyone using a patented article, even if he owns it, is an infringer unless he can show that he has the permission of the patentee.¹² But an unrestricted sale by the patentee or one licensed by him to sell gives the purchaser and subsequent purchasers the patentee's permission to use the article by necessary implication.¹³ It is because the sale is authorized by the patentee that such permission is implied.¹⁴ A sale of an infringing article by an infringer who has a judgment in his favor cannot be said to be

³ See 18 HARV. L. REV. 217.

⁴ This has happened in the case of the Grant patent for a rubber-tired wheel.

⁵ A Supreme Court decision is, of course, a precedent binding on a circuit court in spite of prior decisions of its own the other way. There is, therefore, no basis for the suggestion in *Hurd v. Seim* that the patent is still invalid in the Sixth and Seventh Circuits. See *Hurd v. Seim*, 189 Fed. 591, 595, 597.

⁶ *Kessler v. Eldred*, 206 U. S. 285, 27 Sup. Ct. 611.

⁷ See 2 BLACK, JUDGMENTS, 2 ed., § 504.

⁸ See *Kessler v. Eldred*, 206 U. S. 285, 288, 27 Sup. Ct. 611, 613; *Diamond Rubber Co. v. Consolidated Rubber Tire Co.*, 220 U. S. 428, 445, 31 Sup. Ct. 444, 452.

⁹ This was the rule before *Kessler v. Eldred* was decided. *Eldred v. Breitwieser*, 132 Fed. 251.

¹⁰ See *Hurd v. Seim*, 191 Fed. 832. The case was certified on December 7, 1911.

¹¹ See *Henry v. A. B. Dick Co.*, U. S. Sup. Ct., March 11, 1912.

¹² In most of the infringement cases that arise, the defendant has title to the infringing device, having made it himself.

¹³ *Bloomer v. McQuewan*, 14 How. (U. S.) 539, 549; *Adams v. Burke*, 17 Wall. (U. S.) 453; *Hobbie v. Jennison*, 149 U. S. 355, 13 Sup. Ct. 879; *Keeler v. Standard Folding Bed Co.*, 157 U. S. 659, 15 Sup. Ct. 738.

¹⁴ Even if the cases just cited are to be explained on the ground that the patent statute was not intended to permit the patentee to retain any right in the use of an article which he had sold, and not on the ground of implied permission, it is still clear on the authorities that the article "passes out of the monopoly" only by a sale authorized by the patentee, so that he has had a chance to profit by it. See especially *Keeler v. Standard Folding Bed Co.*, 157 U. S. 659, 665, 15 Sup. Ct. 738, 740.

authorized by the patentee.¹⁵ It is true that the patentee could not prevent the sale, because he is estopped as against the seller from setting up his patent right, but there is no principle of patent law that a purchaser from one who cannot be prevented by the patentee from selling gets implied permission from the patentee to use the article bought.¹⁶ Therefore the judgment in favor of the seller cannot protect the buyer on principles of patent law.

It can serve as a defense for him on principles of *res judicata* only if he is in privity with the seller as to this judgment.¹⁷ It seems clear, however, that he is not. For privity of estate as to a given judgment consists in succession to the right which has been established or limited by the judgment,¹⁸ and the right adjudicated in a suit for the infringement of a patent arises from the patent. An assignee of the patent would, therefore, clearly be in privity with the patentee as to a judgment in such a suit. But not so the assignee of the infringing article, for the right adjudicated is not an incident to the title to the article. The article is concerned merely in that its use was an alleged interference with the patent right;¹⁹ and an assignee of the thing whose use is alleged to infringe the right adjudicated is not in privity with his assignor as to the adjudication.²⁰

JURISDICTION OVER ABSENTEE, BASED UPON PRESENCE OF HIS DEBTOR.

— One claimant of a debt, in suing the debtor, made the other claimant, who was in another state, a party. The absentee's claim was adjudged invalid. This was held to bar his subsequent action against the debtor.¹ *Steltzer v. Chicago, M. & St. P. Ry. Co.*, 134 N. W. 573 (Ia.). The desirability of such jurisdiction depends upon its fairness to the

¹⁵ *Kessler v. Eldred*, *supra*, is sometimes thought to hold that the judgment is tantamount to an authorization to sell. See *Hurd v. Seim*, 101 Fed. 832, 835. But as we have seen, this case is within the ordinary doctrine of *res judicata*, and the court evidently does not mean to go further than to summarize the effect of this doctrine in saying that the judgment gives the alleged infringer a "right" to sell; for by expressly refusing to decide the rights of the purchaser, they show they did not consider this "right" equivalent to a license to sell.

¹⁶ If there were such a doctrine a sale in a foreign country, and so not tortious as to the patentee, would give the purchaser a right to use the article in the United States. Such, however, is not the law. *Boesch v. Gräff*, 133 U. S. 697, 10 Sup. Ct. 378; *Daimler Mfg. Co. v. Conklin*, 170 Fed. 70.

¹⁷ *Litchfield v. Goodnow's Admr.*, 123 U. S. 549, 8 Sup. Ct. 210.

¹⁸ *Hart v. Bates*, 17 S. C. 35, 41.

¹⁹ This case should be distinguished from a case where the defendant sets up a right of his own, which is adjudicated, so that the adjudication binds those to whom he assigns his right. This is often the case in ejectment. *Cf. Whitford v. Crooks*, 54 Mich. 261, 20 N. W. 45.

²⁰ There is an unreasoned case in the Ninth Circuit, *contra. Norton v. San Jose Fruit-Packing Co.*, 79 Fed. 793. But the absurdity of finding privity in such a case may be shown by a simple example. A. purports to have title to a piece of land. B.'s cow walks across the land. A. sues B. for trespass and loses, failing to prove the validity of his title. B. sells his cow to C., and the cow again crosses the land. Surely no one would contend that A. is barred by the judgment in his suit against B., from suing C. for trespass.

¹ *Contra, Ward v. Boyce*, 152 N. Y. 101, 46 N. F. 180. Yet this same state early recognized jurisdiction based on garnishment of the absent defendant's creditors. *Embree v. Hanna*, 5 Johns. (N. Y.) 101.

three parties involved. Justice to the plaintiff does not require it. A method, fairer to the other parties, of relieving the plaintiff when the defendant avoids suit by evading him,² is to let the plaintiff collect the credit on securing the debtor against liability to the absentee. To the absentee such jurisdiction is unjust in compelling him to come, or to litigate, from afar.³ This objection is only partly neutralized by the otherwise equal hardship on the plaintiff; the moving, rather than the defending, party in the suit should bear such a burden. Still greater injustice to the absentee lies in the danger that the grossest frauds may be practised upon him, if he have no actual and seasonable notice of the suit;⁴ but such notice could be made essential for this class of jurisdiction.⁵ To the debtor there would be injustice only in the rare cases in which other countries, denying such jurisdiction, should compel the debtor to pay the former absentee claimant. A favorable Supreme Court decision would prevent this within the United States; and even in the comparatively infrequent cases likely to arise in other common-law⁶ countries, it is not clear that they would deny the debtor the defense of the former judgment; in England, for example, the point has not yet been presented for decision.⁷

Analogy constitutes the only justification of the proposed type of jurisdiction. It is no more objectionable, on principle, than jurisdiction based on the domicile,⁸ or allegiance,⁹ of the defendant, or on the attachment of his local tangible property,¹⁰ or garnishment of his debtors.¹¹ In all these the absentee is, equally as much as in the suggested type of jurisdiction, required to come, or to litigate, from afar; and in none, with the possible exception of attachment proceedings, is the absentee any more likely to know of the suit. Even if the *dicta* in some garnishment cases, that the garnishee, to protect himself, must notify his creditor,¹² should become law, the same could apply equally to suits such as in the principal case. Furthermore, none of these other types give the

² The plaintiff would not have even this difficulty if jurisdiction could be founded on domicile or citizenship; but the decisions on this point are conflicting. See footnotes 8 and 9, *infra*.

³ See *Missouri Pacific Ry. Co. v. Sharitt*, 43 Kan. 375, 386, 23 Pac. 430, 434.

⁴ See *Missouri Pacific Ry. Co. v. Sharitt*, *supra*.

⁵ In the principal case the absentee had actual notice, though this was not required by the statute.

⁶ As jurisdiction in civil-law countries is based on entirely different grounds from those in force in common-law countries, the former would probably give neither greater nor less effect to common-law jurisdiction of the proposed type than to any other type of jurisdiction peculiar to the common law.

⁷ Dicey makes no mention of any English law on the point. Note his general comment. DICEY, *CONFLICT OF LAWS*, 2 ed., 366.

⁸ Such jurisdiction was recognized in *Huntley v. Baker*, 33 Hun (N. Y.) 578; *Henderson v. Staniford*, 105 Mass. 504. *Contra*, *De la Montanya v. De la Montanya*, 112 Cal. 101, 44 Pac. 345; *Raher v. Raher*, 120 N. W. 494.

⁹ Such jurisdiction was recognized in *Ouseley v. Lehigh Valley Trust Co.*, 84 Fed. 602. *Contra*, *Smith v. Grady*, 68 Wis. 215, 31 N. W. 477.

¹⁰ Such jurisdiction was recognized in *Cooper v. Reynolds*, 10 Wall. (U. S.) 308.

¹¹ Such jurisdiction was recognized in *Chicago, Rock Island, etc. Ry. v. Sturm*, 174 U. S. 710, 19 Sup. Ct. 797; *Harvey v. Thompson*, 128 Ga. 147, 57 S. E. 104. *Contra*, *Missouri Pacific Ry. Co. v. Sharitt*, *supra*.

¹² See *Morgan v. Neville*, 74 Pa. St. 52, 57; *Harris v. Balk*, 198 U. S. 215, 227, 25 Sup. Ct. 625, 628.

plaintiff a just relief which is not obtainable with more fairness to the defendant. Only in attachment and garnishment is such relief afforded; the plaintiff could be fully protected by permitting attachment or garnishment merely to maintain the *status quo*, pending suit in a state more properly having jurisdiction over the defendant.¹³ A distinction between the new class of jurisdiction, and all others except that based on garnishment of the absentee's creditors, is that only garnishment and the proposed type present the possibility of injustice, in rare cases, to the debtor; but this is a rather minute consideration.

The proposed type of jurisdiction is helped not only by the fact that many other types are no more justifiable, but also by its close analogy to jurisdiction based on garnishment. Each of these two types includes a suit against a debtor within the state, and a suit against an absentee; the difference is merely that the proposed type seeks to disestablish the absentee's right to the principal debt, and garnishment to establish the absentee's indebtedness to the plaintiff.

EQUITABLE DECREE AS CAUSE OF ACTION IN ANOTHER STATE. — The law of the *situs* governs the creation of legal and equitable interests in land. If that law creates a valid trust, the courts of another jurisdiction will recognize it, even though by the law of the forum a trust would not be created.¹ Conversely, if the law of the *situs* does not predicate a trust upon certain acts, a foreign jurisdiction will not impose a trust, although its law would create one from those acts.² In this country, these principles apply even to marriage settlements.³

Equity does, however, exercise some power over foreign land. Acting *in personam*, it may decree specific performance of a contract to convey,⁴ or require deeds to rectify a boundary.⁵ Even though the law of the *situs* would not recognize a right to a conveyance, equity may decree a conveyance as a remedy for a tort,⁶ or breach of contract.⁷

A recent case raises the interesting question of the effect of such a decree in the jurisdiction where the land is. *De Graffenried v. De Graffenried*, 132 N. Y. Supp. 1107 (App. Div.). A Swiss court granted a divorce to a wife. Swiss law, on a decree of divorce against the husband, requires him to reconvey property which the wife has transferred to him during the marriage. The wife in New York sought a reconveyance

¹³ This is the procedure employed in France and Belgium. *Todesco v. Dumont*, 18 *Journal du Droit International Privé*, 559. See *BAR, INTERNATIONAL LAW* (Gillespie's translation), 536-537.

¹ *In re Fitzgerald*, [1904] 1 Ch. 573; *Knox v. Jones*, 47 N. Y. 389.

² *Acker v. Priest*, 92 Ia. 610, 61 N. W. 235. See 20 *HARV. L. REV.* 382.

³ *Saul v. His Creditors*, 5 Mart. n. s. (La.) 569. In England, it is held that the law of the place of the contract governs the future acquisitions of property. *De Nichols v. Curler*, [1898] 1 Ch. 403. See 12 *HARV. L. REV.* 138.

⁴ *Sutphen v. Fowler*, 9 Paige (N. Y.) 280; *Newton v. Bronson*, 13 N. Y. 587.

⁵ *Penn v. Lord Baltimore*, 1 Ves. 443.

⁶ *Lord Cranstown v. Johnston*, 3 Ves. Jr. 170.

⁷ *Ex parte Pollard*, Mont. & C. 239.

of such property, situated in New York. The court dismissed the bill. Obviously her contention that the Swiss law created in her deed an implied condition to reconvey, in the event of divorce, was groundless, since the law of the *situs* recognized no such interest. Admitting that the decree imposed a duty to reconvey, it could not act directly upon the title.⁸ It is clear law that an action to quiet title brought at the *situs* would not lie.⁹ The enforcement of such a foreign decree is a matter of policy; in the nature of things there would be no difficulty in enforcement if authorized by statute. But by the common law, an equitable decree for the doing of an act, except for the payment of money, is not enforceable in another court.¹⁰ Thus a decree to execute a mortgage in a foreign jurisdiction will not be enforced at the *situs* of the land.¹¹ The rule that jurisdiction respecting foreign land is only *in personam*, is bereft of all practical force if the decree must be enforced by the court of the *situs*. Such a doctrine would really accord jurisdiction over its lands to a foreign court. The most serious objection is that there is no form of procedure for enforcing the personal decree of a court of equity except by order of the court rendering it. The decree is in its nature not the establishment of an obligation, but a method of enforcing an obligation — a mere form of execution.¹² Similarly, where foreign laws impose the duty of providing for a destitute son-in-law, that obligation is not enforceable in another country.¹³ Where Mexican law imposed a personal obligation on a railroad to support the widow of a man killed on its road, so long as she was needy, that obligation could not be enforced in this country, because there is no common-law procedure applicable.¹⁴

A distinction has been suggested between the enforcement of foreign decrees effectuating rights existing apart from the decree, and those in which no antecedent obligation exists.¹⁵ It is submitted that such a distinction is without merit, and the cases relied on to support it show only that when the equitable foreign decree is put in evidence as a defense, it is conclusive.¹⁶ In such cases, there being no procedural difficulties, the foreign decree should always be allowed where equitable defenses are permitted at law.

⁸ *Farmers Loan & Trust Co. v. Postal Tel. Co.*, 55 Conn. 334, 11 Atl. 184; *Price v. Johnston*, 1 Oh. St. 390.

⁹ *Fall v. Fall*, 75 Neb. 104, 113 N. W. 175; *Fall v. Eastin*, 215 U. S. 1, 30 Sup. Ct. 3.

¹⁰ See 3 BEALE, CASES ON THE CONFLICT OF LAWS, 537. Judgments and equitable decrees, however, for the payment of money, are enforceable in a foreign jurisdiction, in an action of debt. *Henley v. Soper*, 8 B. & C. 16; *Thrall v. Waller*, 13 Vt. 231. So upon the granting of a divorce, a decree for the payment of money as alimony is enforceable in another jurisdiction. *Wagner v. Wagner*, 26 R. I. 27, 57 Atl. 1058. But execution will not issue on the judgment of another state without suit on the judgment. *Lamberton v. Grant*, 94 Me. 508, 48 Atl. 127.

¹¹ *Bullock v. Bullock*, 51 N. J. Eq. 444, 27 Atl. 435; s. c. 52 N. J. Eq. 561, 30 Atl. 676.

¹² *Bullock v. Bullock*, 52 N. J. Eq. 561, 30 Atl. 676.

¹³ *De Brimont v. Penniman*, 10 Blatch. (U. S.) 436.

¹⁴ *Slater v. Mexican National R. Co.*, 194 U. S. 120, 24 Sup. Ct. 581.

¹⁵ See 21 HARV. L. REV. 210.

¹⁶ In *Burnley v. Stevenson*, 24 Oh. St. 474, the plaintiff sued in Ohio to recover possession of Ohio land. The defendant was allowed to plead a decree of a Kentucky court for the specific performance of a contract to convey that land, and the decree was considered conclusive. See also *Dunlap v. Byers*, 110 Mich. 109, 67 N. W. 1067.

DAMAGES FOR INJURY TO CHATTELS RECOVERABLE BY PERSON HAVING POSSESSORY INTEREST ONLY. — In early English property law possession was always of contrölling importance.¹ Title, as distinguished from possession, was of little consequence. At that time, when theft of chattels was most common, a recovery depended upon raising hue and cry, and giving hot pursuit.² It is only natural, therefore, that in the early cases the person in possession, and he only, should sue for injury to chattels.³ As between wrongful possessors it was thought that any other state of law would amount to an invitation to all the world to scramble for possession.⁴ Influenced by these matters of history and policy the English court in the Winkfield case⁵ established the doctrine of modern damage law, that a bailee may recover the whole damage done to a bailed chattel by a wrongdoer, though the bailee would not be liable to the bailor for such wrongful act. The court there said, *obiter*, that such a recovery by the bailee would bar a subsequent action by the bailor for the injury to his general property.⁶ The case is law generally.⁷ It has been followed recently by a Canadian court which approved the *dictum* also. *Compton v. Allward*, 48 Can. L. J. 109 (Manitoba, K. B.).

It is a cardinal principle of the law of damages that a cause of action should give only proper compensation.⁸ A right of action, indeed, is merely a substitute given by law for some right of a plaintiff which has been violated. Under the present state of law, however, a bailee, and probably a finder or wrongful possessor,⁹ is permitted to sue and recover damages for injury which he has not sustained. This, with submission, is anomalous. Moreover, it seems there is a danger of great injustice to the general owner. Suppose a bailee sues a wrongdoer and after receiving the full value of the chattel in satisfaction absconds or is insolvent. Or, suppose he settles with the wrongdoer without bringing suit. Surely it is not law that by such satisfaction of judgment or other settlement a person with a mere special property can take away any right of the general owner.¹⁰ And yet this is what the *dicta* in the cases indicate.¹¹ After allowing the bailee a full recovery, the courts could hardly hold otherwise. It is only just to the wrongdoer that he should

¹ See 3 HARV. L. REV. 23-40.

² See POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW, 169; HOLMES, THE COMMON LAW, chap. 5.

³ The authorities prior to 1869 are collected in a note to *Hostler v. Skull*, 1 Am. Dec. 583 (N. C.).

⁴ See *Webb v. Fox*, 7 T. R. 391, 397.

⁵ [1902] P. 42. See 13 HARV. L. REV. 411; 15 *id.* 585.

⁶ See *The Winkfield*, *supra*, 61.

⁷ *Glenwood Lumber Co. v. Phillips*, [1904] A. C. 405; *Union Pacific R. Co. v. Meyer*, 76 Neb. 549, 107 N. W. 793. Two cases in America anticipated the holding in the Winkfield case. *Woodman v. Nottingham*, 49 N. H. 387; *Brewster v. Warner*, 136 Mass. 57.

⁸ *Fay v. Parker*, 53 N. H. 342; *Murphy v. Hobbs*, 7 Colo. 541.

⁹ *Armory v. Delamirie*, 1 Str. 505.

¹⁰ These difficulties of the present law are considered in 2 BEVEN, NEGLIGENCE, 3 ed., 737, note.

¹¹ The cases have, with few exceptions, adopted the *dictum* of the Winkfield case, that the general owner is barred by the special owner's recovery in full. See *Brinsmead v. Harrison*, L. R. 8 C. P. 584.

not be subject to a subsequent suit by the general owner; for the wrongdoer is without a remedy against the bailee who sued him and has had satisfaction.¹²

This condition of law is no longer justifiable. The chief historical reasons underlying the old decisions have now become obsolete.¹³ Today title and the limited possessory interests are recognized as separable,¹⁴ and capable of distinct valuation. So, if both the general owner and one having a special property have suffered damage by the wrongful act of a third party each should bring an action for his own actual loss. There can be no serious objection to a jury determining the value of the particular interest injured. This is done, constantly, in analogous cases, where limited interests in property are involved.¹⁵ This was the view of an English court in an accurate and well-reasoned opinion.¹⁶ It has been made the practice by statute in some American jurisdictions,¹⁷ and recently the Massachusetts court indicated a leaning in this direction.¹⁸ This comports with sound principles of damage law; and the only hardship on the parties would be merely such as are incident to all jury valuations.

REMOTENESS OF TRUSTS FOR ACCUMULATION DURING MINORITIES OF TENANTS IN TAIL.¹ — In determining whether provisions for accumulation by trustees during a term for years are too remote, it is submitted that three things must be considered: 1. the position of the term for years on which the trusts are raised; 2. the power to enter and accumulate; 3. the direction of the accumulated fund. If the term succeeds

¹² *Marriot v. Hampton*, 7 T. R. 269; *Hamlet v. Richardson*, 9 Bing. 644. But cf. *Duke de Cadaval v. Collins*, 4 A. & E. 858.

¹³ See 2 BEVEN, *NEGLIGENCE*, 736, note.

¹⁴ *Nicholls v. Bastard*, 2 C. M. & R. 659; *Manders v. Williams*, 4 Exch. 339.

¹⁵ *Lienor and lienee: Fowler v. Gilman*, 13 Met. (Mass.) 267. Cf. *Mulliner v. Florence*, 3 Q. B. D. 484. Pledgor and pledgee: *White v. Allen*, 133 Mass. 423; *Johnson v. Stear*, 15 C. B. N. s. 330. Mortgagor and mortgagee: *Brierley v. Kendall*, 17 Q. B. 937. Vendor and vendee: *Chinery v. Viall*, 5 H. & N. 288; *Gillard v. Brittan*, 8 M. & W. 575. Bailor and bailee: See *The Winkfield*, *supra*, 60.

¹⁶ *Claridge v. South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422, 423, per Hawkins, J.: "It is true that if a man is in possession of a chattel and his possession is interfered with, he may maintain an action but only for the injury sustained by himself. The right to bring an action against a wrongdoer is one thing, the measure of damages recoverable in such action is another." For discussion of this case, see 6 HARV. L. REV. 156; 13 *id.* 411. It was doubted in *Meux v. Great Eastern Ry. Co.*, [1895] A. C. 387, and overruled by the *Winkfield* case, *supra*.

¹⁷ MICH. LAWS, 1865, 325, referred to in *Weber v. Henry*, 16 Mich. 399; *Darling v. Tegler*, 30 Mich. 54. These are cases of replevin, but this does not alter their importance as a matter of damages. Cf. GEORGIA CODE, 1911, tit. 9, c. 3, art. 2, § 4486; *Lockhart v. Western & Atlantic R.*, 73 Ga. 472.

¹⁸ See *Brown v. New York Central, etc. R. Co.*, 202 Mass. 263, 269, 88 N. E. 781: "The plaintiff has, as bailee, a special property . . . and so might sue in her own name for the injury to it, and at any rate, with the consent of the general owner, could recover full damages therefor." By thus qualifying the rule the Massachusetts court has removed the most objectionable feature from the law as laid down by *Holmes, J.*, in *Warner v. Brewster*, 136 Mass. 57.

¹ This discussion excludes any consideration of the THELLUSSON ACT (39 & 40 GEO. 3, c. 98).

an estate tail, the trust cannot be too remote, as the term can be entirely destroyed by the tenant in tail.²

What if the term precedes an estate tail? If the trustees are to enter and accumulate for one year after the testator's death and pay the fund to a living person the trust is not too remote. But if the fund is to be paid to unborn grandchildren when they reach twenty-five, the trust is too remote,³ because the direction of the fund is too remote. A similar result obtains if the fund is to be paid to the first tenant in tail that reaches twenty-one, for there might not be a tenant in tail who attained his majority for centuries. The power, however, to enter and accumulate is not too remote and there is a resulting trust of the fund to the heir of the testator.⁴ Now if we substitute a power to enter and accumulate during the minority of any tenant in tail, the fund to be paid to the first tenant in tail that reaches twenty-one, the trust is again too remote;⁵ not, it is submitted, because the power to enter is too remote, for that is destructible by a tenant in tail, but because the direction of the fund is too remote. If, the power being the same, the fund were to be paid on the death of a person in being, the trust would not be too remote. And, this being true, it would seem that the trust is not too remote if the fund is to be used to purchase land to be settled on the same limitations as the property settled by the will, for barring the entail would destroy the purpose of the fund.

The English cases are opposed to this last proposition,⁶ but there has been much dispute as to their correctness.⁷ It is true that in all the above supposed cases the legal term is indestructible.⁸ But in none of them was the remoteness determined by that, but rather by examining the power to enter and the direction of the fund. If both of these are destructible by a tenant in tail, it would seem to be immaterial that the dry term is not, for in case both the former are destroyed, the term would become attendant on the inheritance and a *cesser* take place.⁹ By regarding merely the indestructibility of the legal term and not the destructibility of the trust, these cases sacrifice substance to form. A recent English decision is an example of this. The power was to enter and accumulate during the minority of any tenant in tail, the fund to be used in paying off incumbrances.¹⁰ A long line of cases has held that such a direction is not too remote.¹¹ And, since no term was expressly given

² Goodwin v. Clark, 1 Levinz 35.

³ Boughton v. James, 1 Coll. 26.

⁴ Regonwell v. Sydenham, 3 Dow 194. Cf. Hopkins v. Hopkins, Forrester 43. Another view is that the trust to accumulate sinks for the benefit of the devisees. See GRAY, RULE AGAINST PERPETUITIES, 2 ed., § 671. Probably in the last analysis it is a question of the testator's intention. See Cook v. Stationers' Co., 3 Myl. & K. 262, 265; LEWIN, TRUSTS, 12 ed., 167, 177.

⁵ Southampton v. Hertford, 2 Ves. & B. 54.

⁶ Browne v. Stoughton, 14 Sim. 369; Turvin v. Newcome, 3 Kay & J. 16.

⁷ See GRAY, RULE AGAINST PERPETUITIES, 2 ed., § 456; LEWIS, SUPPLEMENT, 174. Arguments in support of these cases are to be found in 3 JUR. N. S., part 2, 181; 1 JARMAN, WILLS, 6 ed., 268 n.

⁸ Eales v. Conn, 4 Sim. 65.

⁹ Cf. SANDERS, USES, 5 ed., 203 n.

¹⁰ Part of the receipts were to be used in maintaining the infant. That object is not too remote.

¹¹ Bacon v. Proctor, Turn. & R. 31; Bateman v. Hotchkin, 10 Beav. 426. See GRAY, RULE AGAINST PERPETUITIES, 2 ed., § 676. *Contra*, Scarisbrick v. Skelmersdale, 17 Sim. 187.

to the trustees,¹² the trust was held to be valid.¹³ *In re Earl of Stamford and Warrington*, [1912] 1 Ch. 343. It seems an unsubstantial refinement to say that the existence of a legal term would alter the result when, if the objects for which it solely exists are destroyed, the term itself becomes a mere shell and ceases.

THE DISABILITY OF HUSBAND AND WIFE AS WITNESSES FOR AND AGAINST EACH OTHER. — 1. At common law a husband or wife cannot testify either for or against the other where one is a party to either a civil suit or a criminal prosecution. The principal reason is that such testimony would be against public policy as tending to disturb the peace of families¹ and as contrary to a natural feeling of propriety.² Other considerations have undoubtedly been influential in producing this doctrine, such as the unity of interest making them subject to the rule disqualifying the parties to any suit,³ and, in the case of the disability to testify in one another's favor, the general disqualification for interest.⁴ The disqualification to testify for one another is clearly an incompetency,⁵ for it would be quite ineffective if it could be waived. Some cases refer to the disability to testify against one another as being the privilege of the party spouse which cannot be waived without his consent.⁶ More generally, however, it has been spoken of as absolute disability. There have been strong implications that it cannot be waived by either spouse,⁷ and it has been held that it cannot be waived by the party spouse.⁸ This rule would seem most in accord with the public policy which is perhaps the true reason of the doctrine. In a recent English case the court, in holding that a statute⁹ which permitted the witness spouse to be called in certain criminal cases without the consent of the party spouse did not make the witness compellable, seems to take the view that this disability is at any rate a privilege of the witness spouse. *Leach v. Director of Public Prosecutions*, 132

¹² The lower court held that the trustees, who had been given a term in another estate, had a legal estate by implication anterior to the estate tail and that the trusts were, therefore, too remote. *In re Earl of Stamford and Warrington*, [1911] 1 Ch. 255. Although the trustees were given power to hold manorial courts and accept surrenders of leases, the Court of Appeal said that surrenders could be accepted without a legal estate, and that the power to hold manorial courts would not be allowed. *Cf. Henderson v. Henderson*, 113 N. Y. 1, 20 N. E. 814. And the court held that there was merely a power of entry to receive the rents, and manage the estate. This goes very far in refusing to create an estate in the trustees by implication, and leads to the inference that the court was anxious to escape the doctrine of *Browne v. Stoughton*, *supra*. To the court's query what estate could be implied, it might be answered, a term for years preceding the other limitations.

¹³ *Cf. Waring v. Coventry*, 1 Myl. & K. 249.

¹ See *Barker v. Dixie*, Cas. t. Hardw. 264; *Kelley v. Proctor*, 41 N. H. 139.

² See *Knowles v. People*, 15 Mich. 408, 413.

³ See 1 GREENLEAF, EVIDENCE, 16 ed., § 334.

⁴ See 1 WIGMORE, EVIDENCE, § 601 (2).

⁵ See 1 WIGMORE, EVIDENCE, § 604 (1).

⁶ See *Pedley v. Wellesley*, 3 C. & P. 558.

⁷ *Davis v. Dinwoody*, 4 T. R. 678. See *Sedgwick v. Watkins*, 1 Ves. Jr. 49.

⁸ *Barker v. Dixie*, *supra*. See *Clark v. Krause*, 13 D. C. 559, 572.

⁹ THE CRIMINAL EVIDENCE ACT, 1898 (61 & 62 VICT., c. 36), § 4.

L. T. J. 416 (Eng., H. L., Feb. 26, 1912). 2. In suits between third parties the fact that one spouse was interested in the event of the cause disqualified the other from testifying.¹⁰ But the fact that the testimony of one spouse would tend to contradict or incriminate the other did not render the witness incompetent.¹¹ 3. The rule that confidential communications are privileged, which extends both to suits to which one spouse is a party and suits between third parties, must also be distinguished.¹² This is based on a clearly justified rule of public policy to insure, as in the case of attorney and client, the full benefit of a relation by encouraging complete confidence between the parties thereto.

These common-law rules as to testimony of husband and wife have everywhere been modified by statute. Often all privilege or incompetency except the third class is removed in civil cases.¹³ Sometimes there is established a privilege of the party spouse in both civil and criminal cases.¹⁴ Almost universally the privilege as to confidential communications is distinguished and confirmed.¹⁵

An exception to the rule of disability to testify against each other has always existed in cases of personal injury by one against the other,¹⁶ and by statute is often extended to all suits between them. Necessity compelled this, since such testimony might be the only means of preventing a wife's becoming a victim to the tyranny of a brutal husband,¹⁷ and public policy entered little into such a case.¹⁸ Personal injury was limited very strictly at common law to actual physical injury.¹⁹ A recent English case which holds that on an indictment against a man for living on the earnings of his wife's prostitution the wife was not a competent witness,²⁰ is in accord with this narrow view. *Director of Public Prosecutions v. Blady*, 28 T. L. R. 193 (Eng., K. B. D., Jan. 18, 1912). Those decisions, however, in which under modern statutes a "personal injury" and a "crime against the other" have been construed more liberally would seem preferable.²¹

¹⁰ *Tiley v. Cowling*, 1 Ld. Raym. 744; *Labaree v. Wood*, 54 Vt. 452.

¹¹ *King v. Inhabitants of All Saints*, 6 M. & S. 194, intimating that the witness must consent; *King v. Inhabitants of Bathwick*, 2 B. & Ad. 639; *Queen v. Halliday*, 29 L. J. M. C. 148.

¹² On theory, this privilege should belong to both parties to the communication. See *People v. Wood*, 126 N. Y. 249, 271, 27 N. E. 362, 368; *Maynard v. Vinton*, 59 Mich. 139, 152, 26 N. W. 401, 407. To the effect that it is incompetency, see *Stein v. Bowman*, 13 Pet. (U. S.) 209, 222. This privilege survives the relation when terminated by death. *Doker v. Hasler*, R. & M. 198. Or by divorce. *Griffith v. Griffith*, 162 Ill. 368, 44 N. E. 820.

¹³ ME., REV. STAT., 1903, c. 84, § 107.

¹⁴ MINN., REV. LAWS, 1905, § 4660.

¹⁵ MASS., REV. LAWS, 1902, c. 175, § 20; MO., ANN. STAT., 1906, § 2637.

¹⁶ 1 BL. COMM. 443; 1 EAST P. C. 455; *Lord Audley's Case*, 3 How. St. Tr. 402 (rape); *State v. Davis*, 3 Brev. (S. C.) 3 (assault and battery); *Wakefield's Case*, 2 Lew. C. C. 279 (fraudulent abduction and marriage).

¹⁷ See *Bentley v. Cooke*, 3 Doug. 422, 424.

¹⁸ See *Soule's Case*, 5 Greenl. (Me.) 407.

¹⁹ Desertion is not a personal injury to come within the exception. *Reeve v. Wood*, 10 Cox C. C. 58. Nor is larceny by wife of husband's goods. *Queen v. Brittleton*, 12 Q. B. D. 266. Nor conspiracy by husband to charge wife with adultery. *State v. Burlingham*, 15 Me. 104.

²⁰ THE CRIMINAL EVIDENCE ACT, 1898, *supra*, § 4, does not provide for this exception.

²¹ Adultery is a crime against the other. *State v. Bennett*, 31 Ia. 24. *Contra*, *State*

RECENT CASES.

BAILEMENTS — BAILEE AND THIRD PERSONS — MEASURE OF DAMAGES IN ACTIONS FOR INJURY TO BAILED CHATTELS. — The plaintiff hired a horse from a livery stable. The defendant negligently caused the death of the horse. *Held*, that the plaintiff may recover the full value of the horse. *Compton v. Allward*, 48 Can. L. J. 109 (Maintoba, K. B.). See NOTES, p. 655.

BAILEMENTS — BAILOR AND BAILEE — DUTY OF ONE LETTING CARRIAGES TO INSPECT. — The plaintiff was injured by the breaking of the axle of a buggy hired from the defendant for a drive. The defect could have been known by the exercise of proper care by the defendant. *Held*, that the defendant is liable for the injury to the plaintiff. *Denver Omnibus & Cab Co. v. Madigan*, 120 Pac. 1044 (Colo., Ct. App.).

A coach owner is liable to passengers for accidents caused by his failure to inspect the coach. *Bremner v. Williams*, 1 C. & P. 414. See *Ingalls v. Bills*, 50 Mass. 1, 15. There is also some authority that one who lets vehicles incurs a similar liability to hirers. See *Hadley v. Cross*, 34 Vt. 586, 588; *Hyman v. Nye*, 6 Q. B. D. 685, 687. But the duty of a coach owner or other common carrier to a passenger differs from the duty of a letter to a hirer, since the performance of the carrier's duty is a matter of public concern. *Railroad Co. v. Lockwood*, 17 Wall. (U. S.) 357. See *Davis v. Chicago, etc. Ry. Co.*, 93 Wis. 470, 483, 67 N. W. 16, 20. It would seem, therefore, that the liability of the letter of carriages depends not on the law of carriers but on that of bailments for hire. It has been held in England that a bailor warrants that the property hired is reasonably fit for the bailee's purposes. *Jones v. Page*, 15 L. T. N. S. 619; *Vogan v. Oulton*, 79 L. T. N. S. 384. American courts have held, however, that the principle of *caveat emptor* applies, and that, accordingly, recovery, if allowed, must be based on negligence. *Horne v. Meakin*, 115 Mass. 326; *Glenn v. Winters*, 17 N. Y. Misc. 597, 40 N. Y. Supp. 659. Such negligence is held to consist in exposing hirers of property to danger by reason of defects therein of which the owner ought to know. *Connors v. Great Northern Elevator Co.*, 90 N. Y. App. Div. 311, 85 N. Y. Supp. 644. Cf. *Elliott v. Hall*, 15 Q. B. D. 315.

BILLS AND NOTES — CHECKS — CHECK CONSTRUED AS ASSIGNMENT OF FUND. — The plaintiff sued as executor to recover the amount of a check drawn by his testator on the defendant bank. The check was presented before the testator's death but was paid after notice of the event. *Held*, that the plaintiff cannot recover. *Wagstaff v. First National Bank*, 134 N. W. 224 (Minn.).

The principal case adopts the view that a check is an assignment *pro tanto* of the funds of the drawer. See 2 DANIEL, NEGOTIABLE INSTRUMENTS, 5 ed., § 1638. While this was formerly the rule in Illinois, Nebraska, Iowa, and Kentucky, the Negotiable Instruments Law has changed it. See BRANNAN, NEGOTIABLE INSTRUMENTS LAW, § 189. But it is still law in South Carolina. *Fogarties v. President, etc. of State Bank*, 12 Rich. L. (S. C.) 518; *Simmons v. Bank of Greenwood*, 41 S. C. 177, 19 S. E. 502. Strictly the depositor has no money in the bank but simply a debt against the bank for the amount of the

v. Armstrong, 4 Minn. 335. And so incest. *State v. Chambers*, 87 Ia. 1, 53 N. W. 1090. *Contra*, *State v. Burt*, 17 S. D. 7, 94 N. W. 409. And so perhaps where wife is wrongfully deprived of dower rights. See *Hach v. Rollins*, 158 Mo. 182, 190, 59 S. W. 232, 234. But bigamy has been held not a crime against the other. *Bassett v. United States*, 137 U. S. 496, 11 Sup. Ct. 165; *People v. Quanstrom*, 93 Mich. 254, 53 N. W. 165.

deposit. *O'Connor v. Mechanics' Bank*, 124 N. Y. 324, 26 N. E. 816. See *Flor-
ence Mining Co. v. Brown*, 124 U. S. 385, 391, 8 Sup. Ct. 531, 534. The universal
power to stop payment on a check shows that it is not even an assignment of the
debt. See 17 HARV. L. REV. 104, 113-114. The result of the principal case
might be reached on the ground that death does not revoke the bank's power to
pay. See 14 HARV. L. REV. 588. *Contra*, *Pullen v. Placer County Bank*, 138 Cal.
169, 71 Pac. 83; *Weiland's Admr. v. State National Bank*, 112 Ky. 310, 65 S. W.
617. If the bank pays without notice, it will be protected. See *Brennan v.
Merchants' National Bank*, 62 Mich. 343, 346, 28 N. W. 881, 882; 17 HARV.
L. REV. 104, 117. If the common-law rule as to revocation of agency by death
is thus abandoned, it would seem consistent to hold that, even if known, death
has no effect on an outstanding order. See MORSE, BANKS AND BANKING,
4 ed., § 400. The Negotiable Instruments Law, though silent on this point,
provides that a check is a bill of exchange. See BRANNAN, NEGOTIABLE INSTRU-
MENTS LAW, § 185. And the drawer's death does not revoke the power to
accept a bill of exchange. *Billing v. Devaux*, 3 M. & G. 565. See *Cutts v.
Perkins*, 12 Mass. 205, 210.

CONFLICT OF LAWS — RECOGNITION OF FOREIGN JUDGMENTS — EFFECT AT
SITUS OF LAND OF FOREIGN DECREE FOR CONVEYANCE OF LAND AS ALIMONY. —
The plaintiff, a citizen of New York, married the defendant, a citizen of Swit-
zerland, in France. The plaintiff conveyed in fee to the defendant a one half
interest in real property, situated in New York. The plaintiff then secured a
divorce in Switzerland, whose law required a divorced husband to reconvey
all property which his former wife had transferred to him during the existence
of the marriage. The plaintiff in New York asked for a decree for reconveyance.
Held, that the plaintiff has no right to the relief prayed. *De Graffenried v.
De Graffenried*, 132 N. Y. Supp. 1107 (App. Div.). See NOTES, p. 653.

CONFLICT OF LAWS — SITUS OF CHOSSES IN ACTION — JURISDICTION IN
REM. — A debtor, garnished in Illinois, pleaded a prior assignment by the prin-
cipal defendant. The assignee, who, it would seem, was not in Illinois, was
made a party and properly served according to Illinois law. The assignee did
not appear, and the debtor-garnishee paid. The assignee later sued him in
Iowa. *Held*, that the Illinois judgment is a bar. *Steltzer v. Chicago, M. &
St. P. Ry. Co.* 134 N. W. 573 (Ia.). See NOTES, p. 651.

CONSTITUTIONAL LAW — EX POST FACTO AND RETROACTIVE LAWS —
STATUTE ADMITTING EVIDENCE AGAINST ACCUSED. — A statute provided that
no evidence or pleading of a party obtained from him by judicial proceeding
should be used against him in any criminal case. The statute was repealed
after the commission of a forgery for which the defendant was indicted, but
before trial. The forged writing had been incorporated by the defendant into
his pleadings in a civil case. *Held*, that the writing is not admissible in evidence
against him. *Frisby v. United States*, 44 Chic. Leg. N. 227 (D. C., Ct. App.,
Jan. 2, 1912).

A statute giving certain evidence the effect of a presumption cannot operate
retrospectively in criminal cases. *State v. Cincinnati Tin & Japan Co.*, 66 Oh.
St. 182, 64 N. E. 68; *State v. Bond*, 4 Jones (N. C.) 9. *A fortiori*, if the pre-
sumption is conclusive. *United States v. Hughes*, Fed. Cas., No. 15,416;
Kring v. Missouri, 107 U. S. 221, 2 Sup. Ct. 443. These are really changes
in substantive law. See THAYER, PRELIMINARY TREATISE ON EVIDENCE,
chap. viii. Changes in procedure destroying substantial rights of the ac-
cused are *ex post facto* laws. *State v. Baker*, 50 La. Ann. 1247, 24 So. 240.
See *Calder v. Bull*, 3 Dall. (U. S.) 386, 390; *Hallock v. United States*, 185
Fed. 417, 422. Thus, a statute allowing conviction upon evidence previously

insufficient is *ex post facto*, though creating no presumption. *Hart v. State*, 40 Ala. 32; *Goode v. State*, 50 Fla. 45, 39 So. 461. But one changing the competency of witnesses is not. *Hopt v. Territory of Utah*, 110 U. S. 574, 4 Sup. Ct. 202; *Wester v. State*, 142 Ala. 56, 38 So. 1010; *Mrous v. State*, 31 Tex. Cr. R. 597, 21 S. W. 764. The courts apparently give no weight to the difference between changes in admissibility of the evidence and changes in its legal effect. *State v. Johnson*, 12 Minn. 476. Nor to the fact that the statute admits, rather than excludes, the evidence. *Cf. O'Bryan v. Allen*, 108 Mo. 227, 18 S. W. 892. What is a permissible change of the accused's rights seems a matter of degree. In the principal case, the statute applied only to criminal cases. The retroactive effect of a statute admitting in all cases writings previously inadmissible has been held constitutional. *Thompson v. Missouri*, 171 U. S. 380, 18 Sup. Ct. 922. The breadth of such a statute may more conclusively negative any legislative intent of breaking faith to the accused, but the distinction seems fine, and the presumption in favor of the constitutionality of the statute should prevail.

CONSTITUTIONAL LAW — POWERS OF THE JUDICIARY — NO JURISDICTION TO ENFORCE CONSTITUTIONAL GUARANTEE OF REPUBLICAN FORM OF GOVERNMENT. — An amendment to the Constitution of Oregon provided for the initiative and referendum. The defendant corporation was taxed under a statute enacted by a reference to the people. It sought to avoid the tax on the ground that the statute and amendment violated the provision in the Federal Constitution that guarantees to each state a republican form of government. The Supreme Court of Oregon sustained the tax. The defendant appealed to the Supreme Court of the United States. *Held*, that the case be dismissed for want of jurisdiction. *Pacific States Tel. & Tel. Co. v. Oregon*, U. S. Sup. Ct., Feb. 19, 1912. See NOTES, p. 644.

CORPORATIONS — STOCKHOLDERS: RIGHTS INCIDENT TO MEMBERSHIP — STATUTORY RIGHT TO INSPECTION OF STOCK BOOK. — A statute provided that the stock book of every stock corporation should be open daily for the inspection of its stockholders, and provided for the recovery of a penalty and damages for refusal to allow inspection. On an application by a stockholder for a writ of *mandamus* to compel allowance of an inspection, the corporation stated facts showing that the relator's purpose in seeking an examination was "sinister and inimical to the defendant." *Held*, that the writ should be denied. *People ex rel. Britton v. American Press Association*, 133 N. Y. Supp. 216 (App. Div.).

The following decisions support the principal case. *Wight v. Heublein*, 111 Md. 649, 75 Atl. 507; *State ex rel. O'Hara v. National Biscuit Co.*, 69 N. J. L. 198, 54 Atl. 241; *Commonwealth v. Empire Passenger Ry. Co.*, 134 Pa. St. 237, 19 Atl. 629. But the weight of authority is *contra*. *Muller v. Eastern and Midlands Ry. Co.*, 38 Ch. D. 92; *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Oh. St. 189, 56 N. E. 1033; *Venner v. Chicago City Ry. Co.*, 246 Ill. 170, 92 N. E. 643. The legislature could expressly provide that *mandamus* should always be granted. And it is frequently argued that the existing statutes intend to procure an absolute right to inspect the books in order to protect the stockholder from any possibility of baffling litigation. *Johnson v. Langdon*, 135 Cal. 624, 67 Pac. 1050; *Kimball v. Dern*, 116 Pac. 28 (Utah). But the interests of the corporation and the other stockholders are entitled to some consideration. And in the absence of express legislative command, it is submitted that *mandamus* should not be granted to one who has not clean hands. Such a plaintiff should be remitted to his suit for damages in which no issue of the stockholder's purposes could be raised. However, the current of judicial opinion in New York is against the principal case. *People ex rel. Callanan v.*

Keeseville, etc. R. Co., 106 N. Y. App. Div. 349. See *Henry v. Babcock & Wilcox Co.*, 196 N. Y. 302, 305, 89 N. E. 942, 943.

CRIMINAL LAW — DEFENSES — DURESS IN ROBBERY AS DEFENSE TO RESULTING MURDER. — The defendant under duress participated in a robbery which ended in the murder by the defendant's associate of the person robbed. A statute provided that duress should be an excuse for any crime except murder. *Held*, that the defendant may be convicted of murder. *State v. Moretti*, 120 Pac. 102 (Wash.).

A person is guilty of murder if killing accidentally results from his own act in the commission of robbery. *People v. Milton*, 145 Cal. 169, 78 Pac. 549. *Cf. Regina v. Serné*, 16 Cox C. C. 311. See 1 HALE, PLEAS OF THE CROWN, 465. If, however, the defendant has a justification for the robbery, he should not be held for the accidental consequences, because the necessary legal blameworthiness is absent. *Cf. Queen v. Bruce*, 2 Cox C. C. 262; *Williams v. State*, 81 Ala. 1, 1 So. 179. Thus, if the killing in the principal case resulted from the defendant's own act, and the statute excuses that act, the defendant should not be held. This, it seems, is the reasonable interpretation, since penal statutes are to be construed in favor of the accused. *Commonwealth v. Standard Oil Co.*, 101 Pa. St. 119. In the absence of excuse, the defendant would be guilty of murder even though the killing is the act of a confederate. *State v. Barrett*, 40 Minn. 77, 41 N. W. 463; *State v. King*, 24 Utah 482, 68 Pac. 418. *Cf. Commonwealth v. Moore*, 121 Ky. 97, 88 S. W. 1085. And even if the statute provides an excuse for the defendant's act, the defendant might be held for his confederate's act on a doctrine analogous to that of agency. *Cf. People v. Knapp*, 26 Mich. 112; *Williams v. State*, *supra*. But, it is submitted, the defendant should be considered guilty of murder only as a result of his own act of robbery, and so should not be held.

DEEDS — CONSTRUCTION AND OPERATION IN GENERAL — PAROL EVIDENCE TO VARY RECITAL OF CONSIDERATION. — A deed to an intestate from his mother recited a consideration of \$2000. The heirs of the whole blood contested the estate with those of the half blood under a statute providing that an estate which vested in an intestate by gift from an ancestor should descend from him solely to relatives of the blood of that ancestor. *Held*, that parol evidence is admissible to show that the sole consideration for the deed to intestate was love and affection. *Harman v. Fisher*, 134 N. W. 246 (Neb.).

The recital of consideration in a deed cannot be contradicted for the purpose of defeating the instrument as a conveyance. *Grout v. Townsend*, 2 Den. (N. Y.) 336; *Miller v. Edgerton*, 38 Kan. 36. But with this exception courts allow great latitude of inquiry as to what, if any, consideration really passed between the parties. See 2 DEVLIN, DEEDS, 3 ed., § 834. In suit for the purchase price the grantor may show that none, or not all, of the consideration was in fact paid. *Gully v. Grubbs*, 1 J. J. Marsh. (Ky.) 387; *Bowen v. Bell*, 20 Johns. (N. Y.) 338. But see *Baker v. Dewey*, 1 B. & C. 704, 707; *Lampon v. Corke*, 5 B. & Ald. 606, 611. Or he may show that payment was to be in something other than money. *McCrea v. Purmort*, 16 Wend. (N. Y.) 460. For most purposes the consideration clause is regarded as a mere acknowledgment, subject to contradiction by parol like any other receipt. See 4 WIGMORE, EVIDENCE, § 2433. It has been held that, though the amount of consideration may be varied by parol, its kind cannot, so as to change the deed from one of purchase to one of gift and alter the descent. *Groves v. Groves*, 65 Oh. St. 442, 62 N. E. 1044. *Cf. Yates v. Burt*, 143 S. W. 73 (Mo.). But to make such a distinction would enable the grantor to make a gift and yet avoid the applicable statute of descent. The result of the principal case seems preferable. *Rockhill v. Spraggs*, 9 Ind. 30; *Meeker v. Meeker*, 16 Conn. 383.

EMINENT DOMAIN—WHEN IS PROPERTY TAKEN—GRADE OF STREET CHANGED BY RAILROAD.—In raising the grade of its roadbed, the defendant railroad company was required by a city ordinance to make the necessary alterations in the grade of streets crossed by the railroad, as directed by the city engineer. The grade of the street in front of the plaintiff's property was raised. *Held*, that she is entitled to compensation for damage to her right of access. *Pittsburg, C., C. & St. L. Ry. Co. v. Atkinson*, 97 N. E. 353 (Ind., App. Ct.).

The alteration of street grades for street purposes gives abutters no claim to compensation. *Callender v. Marsh*, 1 Pick. (Mass.) 418. See 1 LEWIS, **EMINENT DOMAIN**, 3 ed., §§ 133, 134, 137. It is otherwise if the street is modified to serve as a dike or furnish materials for another street. *City of Shawneetown v. Mason*, 82 Ill. 337; *Mayor, etc. of Macon v. Hill*, 58 Ga. 595. Raising an approach for an ordinary bridge is a street purpose. *Willis v. Winona City*, 59 Minn. 27, 60 N. W. 814; *Willets Mfg. Co. v. Board of Chosen Freeholders*, 62 N. J. L. 95, 40 Atl. 782. Elevating one for private accommodation is not. *Ranson v. City of Sault Ste. Marie*, 143 Mich. 661, 107 N. W. 439. But a street purpose does not cease to be such because a corporation is required to execute it. *Chicago, etc. Ry. Co. v. Johnson*, 45 Ind. App. 162, 90 N. E. 507; *Conklin v. New York, etc. Ry. Co.*, 102 N. Y. 107, 6 N. E. 663. Accordingly, many courts deny damages for changes in grade through the construction of a railroad crossing. *Rauenstein v. New York, etc. Ry. Co.*, 136 N. Y. 528, 32 N. E. 1047; *Atchison, etc. R. Co. v. Arnold*, 52 Kan. 729, 35 Pac. 780. Certainly there is no less a street after the change. *City of New Haven v. New York & New Haven R. Co.*, 39 Conn. 128; *Louisville Steam Forge Co. v. Mehler*, 112 Ky. 438, 64 S. W. 652. Yet, since the necessity is for the accommodation of a distinct line of travel, not for any additional utility in the street itself, the better opinion and the probable weight of authority support the principal case. *Buchner v. Chicago, etc. Ry. Co.*, 56 Wis. 403, 60 Wis. 264, 14 N. W. 273, 19 N. W. 56; *Perrine v. Pennsylvania R. Co.*, 72 N. J. L. 398, 61 Atl. 87. The doctrine extends to all subsequent improvements necessary to preserve the utility of a preëxisting street. *Burritt v. City of New Haven*, 42 Conn. 174. In the construction of a new street, however, a crossing would seem to be a necessary part. *Cf. Northern Central Ry. Co. v. Mayor, etc. of Baltimore*, 46 Md. 425; *City of Chester v. Philadelphia, etc. R. Co.*, 3 Walk. (Pa.) 368. If so, its subsequent alteration apparently involves no new burden on adjoining land. *Contra, Egbert v. Lake Shore, etc. Ry. Co.*, 6 Ind. App. 350, 33 N. E. 659.

EXECUTORS AND ADMINISTRATORS—RIGHTS, POWERS, AND DUTIES—ACCOUNTABILITY FOR ACQUISITIONS FROM LEGATEE.—Before legacies were payable, after a legatee had given him a power of attorney to pledge or assign her legacy of \$2381.25 for \$2000, the executor advanced that sum to her from his own money. When he discharged the legacy she returned the balance in recognition of the accommodation. *Held*, that the executor is liable to account to the estate for the balance, minus legal interest on the amount loaned. *Matter of De Vany*, 147 N. Y. App. Div. 494, 132 N. Y. Supp. 582.

Like other fiduciaries, an executor is not allowed to transfer to himself any interest in the estate. *Michoud v. Girod*, 4 How. (U. S.) 503. Such transactions, however, are not void, but voidable by the beneficiaries. *Den d. Hance v. McKnight*, 11 N. J. L. 385; *Remick v. Butlerfield*, 31 N. H. 70. A purchase directly from an individual beneficiary cannot be avoided if the executor sustains the burden of proving the transaction equitable. *State ex rel. Jones v. Jones*, 131 Mo. 194, 33 S. W. 23. *Cf. Brown v. Cowell*, 116 Mass. 461. See 1 PERRY, **TRUSTS AND TRUSTEES**, 6 ed., § 205. In any event, the other beneficiaries cannot avoid it. See *Clark v. Jacobs*, 56 How. Pr. (N. Y.) 519, 522. But cases confuse this with the question whether they can hold the executor

as constructive trustee. *Peyton v. Smith*, 22 N. C. 325; *Hale v. Aaron*, 77 N. C. 371. They cannot, against the right of the vendor to avoid. *Barton v. Hassard*, 3 Dr. & War. 461. But, irrespective of actual fraud, the danger in a conflict of interest requires that all profits from discounting the claims of creditors should accrue to the estate. *Woods v. Irwin*, 163 Pa. St. 413, 30 Atl. 232; *Cox v. John*, 32 Oh. St. 532. The executor is equally acting within his duties and under the advantage of his official knowledge when buying at a discount the claims of legatees. *Lovett v. Morey*, 66 N. H. 273, 20 Atl. 283. There seems to be no reason for a different rule. *Contra*, *Peyton v. Smith*, *supra*; *Hale v. Aaron*, *supra*. Finding that the transaction was not a gift but a payment on account of the advancement, the court in the principal case probably reached the correct result.

INSURANCE — FIDELITY INSURANCE — VARIATION OF RISK. — A bond executed by the defendant to secure the plaintiff bank against loss incurred through employing X. as assistant cashier contained a provision "that the employé can perform other duties than those properly belonging to the position mentioned . . . without notice . . . to the company." After the bond was executed, X. acquired a majority of the stock of the bank, and became a director and cashier. He then defaulted. *Held*, that the defendant is discharged from liability on the bond. *Farmers' & Merchants' State Bank v. United States Fidelity & Guaranty Co.*, 133 N. W. 247 (S. D.).

The equitable defense based on variation of risk by reason of a material change in the employee's duties is waived in this case by the clause in the bond. *Fidelity and Casualty Co. v. Gate City National Bank*, 97 Ga. 634, 25 S. E. 392; *Champion Ice, etc. Co. v. American Bonding & Trust Co.*, 115 Ky. 863, 75 S. W. 197. *Contra*, *National Mechanics' Banking Association v. Conkling*, 90 N. Y. 116. The contract of insurance is a personal one. See FROST, GUARANTY INSURANCE, 2 ed., § 113 (E). A change in the personality of the insured, a change in partnership, or from a partnership to a corporation, would give a defense. *Dance v. Girdler*, 1 B. & P. N. 34; *Dry v. Davy*, 10 A. & E. 30. But though the membership of a corporation is always changing, the corporation remains the same. *Cf. London, etc. Ry. Co. v. Goodwin*, 3 Exch. 320. The majority of the court rest their decision on the ground that the subsequent acquisition of a majority of the stock by the employee brought about a situation not contemplated by the parties, in which it would be unconscionable to continue to hold the surety to his legal obligation without giving notice. No cases have been found to support the decision. Where the risk is increased through no act of the obligee, the cases go no further than to give a defense when the employee is retained in service after knowledge of his dishonesty. *Phillips v. Foxall*, L. R. 7 Q. B. 666; *Watertown Fire Ins. Co. v. Simmons*, 131 Mass. 85. It is submitted that the facts of the principal case do not warrant a further imposition of affirmative duties on the insured.

INTERSTATE 'COMMERCE — INTERSTATE COMMERCE COMMISSION — POWER TO DENY REPARATION ON GROUND OF LACHES. — A shipper sought reparation through the Interstate Commerce Commission for excessive freight charges. The commission found that the rate charged was unreasonable, but denied relief for all charges previous to the filing of the complaint on the ground of laches. *Held*, that it cannot deny relief on such a ground. *Russe v. Interstate Commerce Commission*, U. S. Commerce Ct., Feb. 13, 1912.

The Interstate Commerce Commission derives all its powers from the Interstate Commerce Act of 1887 and its supplements, and can exercise no powers which are not given it thereby. See BEALE & WYMAN, RAILROAD RATE REGULATION, § 1034. In considering a complaint its sole consideration must be whether or not the situation which the carriers have created violates that act.

See *New York Produce Exchange v. Baltimore & Ohio R. Co.*, 7 Interst. C. Rep. 612, 658. Thus, the commissioners have no power to declare a rate unreasonable on the ground that the carrier has estopped itself from making a raise by a long-continued lower rate. *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U. S. 433, 31 Sup. Ct. 288. If they proceed in a federal court to enforce their order, they are not prejudiced by the fact that the original complainant came before them with unclean hands. *Interstate Commerce Commission v. Southern Pacific Co.*, 132 Fed. 829. Nor can the fact that the shipper has been engaged in an unlawful combination bar his right to relief at the hands of the commission. *Tift v. Southern R. Co.*, 10 Interst. C. Rep. 548. The act allows the shipper two years in which to file his complaint. U. S. COMP. STAT., SUPP. 1909, 1159. It seems an unwarranted assumption of authority for the commission to shorten the time expressly allowed by the very act which it was created to enforce.

JUDGMENTS — OPERATION AS BAR TO OTHER ACTIONS — EFFECT OF JUDGMENT AS JUSTIFICATION FOR ACTS DONE BEFORE ITS REVERSAL. — A decree that the defendant was entitled to a certain amount of the water of a stream was reversed on an appeal by the plaintiff. The undertaking given on appeal did not stay the operation of the decree. After the rendering of the decree and before its reversal the defendant used the amount of water allowed by the decree. *Held*, that the plaintiff cannot recover for damage to his land caused thereby. *Porter v. Small*, 120 Pac. 393 (Or.).

It seems to be well settled that no action in tort will lie for acts done in pursuance of an erroneous judgment, subsequently reversed. Where the alleged tort is false imprisonment, no tort is committed, since irregularity in the legal process is an element of the wrong. *Simpson v. Hornbeck*, 3 Lans. (N. Y.) 53; *Williams v. Smith*, 14 C. B. N. s. 596. In other cases, however, by the reversal the acts done are subsequently proved wrongful; yet the fact that they are done in pursuance of a legal judgment is regarded as a justification. *Loring v. Steineman*, 42 Mass. 204; *Thompson v. Reasoner*, 122 Ind. 454, 24 N. E. 223. *Cf. Day v. Bach*, 87 N. Y. 56. To allow the action would involve the assumption that a valid judgment is not a foundation of rights. *Bridges v. McAlister*, 106 Ky. 791, 51 S. W. 603. *Cf. Mark v. Hyatt*, 135 N. Y. 306, 31 N. E. 1099. Though this may work a hardship on the defendant, he may protect himself by getting a stay of execution, on giving a proper bond. But it seems also well settled that the defendant must restore any profit he may have made, since it is not equitable for him to keep it. *Lott v. Swezey*, 29 Barb. (N. Y.) 87; *Travellers' Ins. Co. v. Heath*, 95 Pa. St. 333. In the principal case, however, the question of restitution was not presented.

LEGISLATURES — RIGHT OF SPEAKER TO PREVENT DISORDER BY COMPELLING ATTENDANCE OF MEMBER. — A member of a colonial legislative assembly left the chamber in a disorderly manner. As a necessary measure, to prevent further disorder, the speaker had the sergeant-at-arms bring him back and admonished him. *Held*, that the speaker is liable in an action for false imprisonment. *Perry v. Willis*, 11 N. S. W. S. R. 479.

A colonial legislative assembly has no inherent power to punish either a stranger or one of its members for contempt. *Kielley v. Carson*, 4 Moore P. C. 63; *Doyle v. Falconer*, 4 Moore P. C. N. s. 203. Every legislative assembly, when duly constituted, has the power to compel the attendance of its members. See CUSHING, LAW & PRACTICE OF LEGISLATIVE ASSEMBLIES, 2 ed., § 264. A member who is guilty of disorderly conduct in the assembly may be removed by order of the assembly. See *Doyle v. Falconer*, *supra*, 219, 220. It has been held that this power of removal is impliedly delegated to the speaker as necessarily incident to his office as presiding officer. *Toohey*

v. Melville, 13 N. S. W. L. R. 132. See *Lucas v. Mason*, L. R. 10 Exch. 251, 254. It is not certain that the assembly could compel the attendance of a member to be reprimanded rather than to aid in its legislative functions. But conceding this power in the assembly, it is not such a needful incident to the office of the speaker that it can fairly be said to be delegated to him in the absence of an express authorization. The result reached by the court in the principal case is thus, it seems, correct.

LICENSES — LICENSOR'S LIABILITY TO LICENSEE — AFFIRMATIVE NEGLIGENCE ACTS. — The plaintiff, in common with the public, had for many years used a road across the defendant's premises, on which a quarry had gradually been enlarged in the direction of the roadway. The excavation was then rapidly advanced toward and across the road without the plaintiff's knowledge. The plaintiff, while walking on the road at night, fell into the quarry and was injured. *Held*, that he cannot recover. *Fox v. Warner-Quinlan Asphalt Co.*, 204 N. Y. 240, 97 N. E. 497.

Continuous use of a private way by members of the public makes them no more than bare licensees. *Stevens v. Nichols*, 155 Mass. 472, 29 N. E. 1150. *Cf. Hounsell v. Smyth*, 7 C. B. N. S. 731. *Contra, Hanson v. Spokane, etc. Water Co.*, 58 Wash. 6, 107 Pac. 863. The landowner owes to licensees no duty to make the premises safe. *Gautret v. Egerton*, L. R. 2 C. P. 371. It has been held that he is liable to them only for wilful injury. *Illinois Central R. Co. v. Godfrey*, 71 Ill. 500; *Dixon v. Swift*, 98 Me. 207, 56 Atl. 761. Since, however, the presence of licensees is foreseeable, most courts hold that property-owners must refrain from acts likely to injure them. *Corrigan v. Union Sugar Refinery*, 98 Mass. 577; *Felton v. Aubrey*, 74 Fed. 350. A distinction has been made between directly bringing force to bear against licensees and altering the condition of the premises without taking proper precautions, which has been held a mere omission. *Nicholson v. Erie Ry. Co.*, 41 N. Y. 525. See *Byrne v. New York, etc. R. Co.*, 104 N. Y. 362, 366, 10 N. E. 539, 540. Alteration, however, is certainly affirmative action, and if calculated to injure licensees, is negligence towards them. *Corby v. Hill*, 4 C. B. N. S. 556; *Rooney v. Woolworth*, 78 Conn. 167, 61 Atl. 366. The landowner, however, may properly assume that they will foresee the gradual changes likely to be made in the ordinary course of business. *M'Cann v. Thilemann*, 36 N. Y. Misc. 145, 72 N. Y. Supp. 1076. Where, however, the alteration, as in the principal case, is made suddenly and without warning, it would seem that the defendant should be liable. *Cf. Carskaddon v. Mills*, 5 Ind. App. 22, 31 N. E. 559.

MANDAMUS — PARTIES — RIGHT OF PRIVATE CITIZEN TO COMPEL ISSUANCE OF WARRANT FOR ARREST. — The petitioner, a private individual, sought by *mandamus* proceedings to compel a justice of the peace to issue a warrant for arrest on a criminal charge of baseball playing on Sunday. *Held*, that he is not a proper relator. *Nicholson v. State ex rel. Blüch*, 57 So. 194 (Fla.).

By the weight of authority any member of the public may institute proceedings in *mandamus* on a matter of public interest without showing any special interest in himself. *People ex rel. Case v. Collins*, 19 Wend. (N. Y.) 56; *State ex rel. Ferry v. Williams*, 41 N. J. L. 332. The principal case denies the plaintiff the right on the ground that the matter in question is of interest only to the state as sovereign. There is, doubtless, a distinction between matters of interest to the government as such and those of interest to the public. See *Berube v. Wheeler*, 128 Mich. 32, 35, 87 N. W. 50, 51. But it is submitted that the public is interested in this particular matter. The authorities recognize such an interest in a private citizen to force a magistrate to act in his proper district. *State ex rel. Ferguson v. Shropshire*, 4 Neb. 411. So also the public is interested in the enforcement of the liquor laws. *State ex rel. Ferry v. Williams, supra.*

And indeed the criminal law would seem to be chiefly concerned with wrongs injurious to the public at large. See 1 BISHOP, NEW CRIMINAL LAW, § 32. Cf. BOSANQUET, PHILOSOPHICAL THEORY OF THE STATE, 37, 39. When a public officer refuses to perform his function, the citizen has no adequate remedy but *mandamus*. This consideration, however, leads to a modification of the citizen's right in that he must show that the officer does not intend to perform his duty before he may enforce performance by *mandamus*. *In re Whitney*, 3 N. Y. Supp. 838.

MUNICIPAL CORPORATIONS — LIABILITY FOR TORTS — INJURY FROM FALLING LIMB OF DEAD TREE ON STREET. — The plaintiff was injured by a limb falling from a tree standing on a public street. The tree had been in a dangerous condition over a year. *Held*, that the municipal corporation is not liable. *Dyer v. City of Danbury*, 81 Atl. 958 (Conn.). See NOTES, p. 646.

MUNICIPAL CORPORATIONS — LIABILITY FOR TORTS — ULTRA VIRES UNDERTAKING. — The plaintiff was injured by a blast from a quarry, operated by the municipal authorities. The city had no power to operate the quarry. *Held*, that the plaintiff cannot recover. *City of Radford v. Clark*, 73 S. E. 571 (Va.). See NOTES, p. 648.

PATENTS — EFFECT OF DECREE FOR DEFENDANT IN INFRINGEMENT SUIT. — A patent for certain wheels was declared invalid in a suit in the Seventh Circuit against the Kokomo Company. The patent was held valid in the Second Circuit, and this holding was affirmed by the Supreme Court. Purchasers of wheels from the Kokomo Company are sued for infringement in the second Circuit. *Held*, that they are not protected by the decree in favor of the seller. *Hurd v. Seim*, 189 Fed. 591 (Circ. Ct., N. D. N. Y.); *Hurd v. Woodward Co.*, 190 Fed. 28 (Circ. Ct., N. D. N. Y.). See NOTES, p. 649.

PATENTS — INFRINGEMENT — LICENSE RESTRICTION THAT USER BUY UNPATENTED SUPPLIES ONLY FROM PATENTEE. — Patented mimeographs were sold with license restrictions that they be used only with supplies of the patentee's production. The defendant sold unpatented ink with the expectation that it would be used on the patented mimeograph. *Held*, that the defendant is guilty of contributory infringement. *Henry v. A. B. Dick Co.*, U. S. Sup. Ct., March 11, 1912. See NOTES, p. 641.

QUASI-CONTRACTS — MONEY PAID UNDER DURESS OR COMPELSION OF LAW — RECOVERY OF TAXES COLLECTED UNDER UNCONSTITUTIONAL STATUTE. — A state statute levied an unconstitutional tax upon foreign corporations and provided for heavy monetary penalties and forfeiture of the right to do business upon failure to pay. *Held*, that a corporation paying the tax under protest may recover it. *Atchison, etc. Ry. Co. v. O'Connor*, 32 Sup. Ct. 216.

A state statute levied a franchise tax upon foreign corporations authorized to do business in the state and provided for a heavy penalty and forfeiture of the right to do business upon non-payment. The supreme court of the state had held that a previous similar statute applied only to corporations doing intrastate business. *Held*, that a foreign corporation doing interstate business cannot recover the tax paid under protest. *Gaar, Scott & Co. v. Shannon*, 32 Sup. Ct. 236.

Institution of suit on an illegal claim is not duress, since the invalidity of the claim may be shown as a defense. See *Town Council v. Burnett*, 34 Ala. 400, 404; *Oceanic Steam Navigation Co. v. Tappan*, 16 Blatch. (U. S.) 296, 301. But see KEENER, QUASI-CONTRACTS, 434. Nor is a demand for property under a void warrant duress, unless the warrant is *prima facie* valid, for such a

warrant may be resisted. *Cf. Sowles v. Soule*, 59 Vt. 131, 7 Atl. 715; *Canfield Salt & Lumber Co. v. Township of Manistee*, 100 Mich. 466, 59 N. W. 164. See 2 COOLEY, TAXATION, 3 ed., 1476. And since mere sale of realty under an illegal tax claim is void and does not cloud the title, it is not duress. *City of Detroit v. Martin*, 34 Mich. 170; *Sonoma County Tax Case*, 13 Fed. 789. But *cf. Montgomery v. Cowlitz County*, 14 Wash. 230, 44 Pac. 259. It has been held, in accord with the principal cases, that a statute imposing penalties for non-payment is duress. *Ratterman v. Express Co.*, 49 Oh. St. 608, 32 N. E. 754. Though its validity could be attacked in the action for collection, if it proved valid, the penalties for non-payment would be imposed. This risk makes payment under protest involuntary. *Contra, Michel Brewing Co. v. State*, 19 S. D. 302, 103 N. W. 40. The first of the principal cases further holds that a statute automatically forfeiting the franchise constitutes duress. A decision may subsequently declare the statute void *ab initio*, but its effect upon the business in the meantime cannot be erased. The same considerations apply when it is uncertain whether the plaintiff's business is within the statute. But when the terms of the statute are reasonably free from doubt, or have been made so by judicial construction, and no step except demand is taken against the business, there is no duress.

RES JUDICATA — MATTERS CONCLUDED — FORMER JUDGMENT BAR TO A NEGATIVE DEFENSE. — In answer to a plea of no consideration in an action for rent, the plaintiff pleaded a recovery on a former instalment. In the former action, there had been no allegation or denial of consideration. *Held*, that the defendant is estopped by the former judgment. *Cooke v. Rickman*, 105 L. T. 896 (Eng., K. B. D., July 13, 1911).

In a subsequent action between the same parties or their privies, a prior judgment is conclusive evidence as to all questions actually adjudicated thereby. *Price v. Carlton*, 121 Ga. 12, 48 S. E. 721; *Anthanissen v. Dart*, 94 Ga. 543, 20 S. E. 124. This is true even though the later action is on a different cause of action, as for a subsequent instalment. *Koehler v. Holt Mfg. Co.*, 146 Cal. 335, 80 Pac. 73. See *Bond v. Markstrum*, 102 Mich. 11, 19, 60 N. W. 282, 284. The rule is clearly fictitious, since, while declaring the prior judgment conclusive evidence, it confines its operation in this respect to actions between the parties. See 17 HARV. L. REV. 406. The policy underlying it is the desirability of limiting litigation. See 2 BLACK, JUDGMENTS, 2 ed., § 500. It is justified on the ground that the parties have admitted the fact or have had adequate opportunity to contest it. See 2 BLACK, JUDGMENTS, 2 ed., § 614. Consequently, it does not apply where the defendant sets up an affirmative defense not considered in the former action. *Richardson v. City of Eureka*, 110 Cal. 441, 42 Pac. 965; *Stone v. St. Louis Stamping Co.*, 155 Mass. 267, 29 N. E. 623. But where the fact, even though not in terms pleaded or denied in the prior suit, was essential to the judgment in that suit, it seems properly held *res judicata*. This is especially true if, as suggested in the principal case, the Judicature Act requires no allegation of such essential fact.

RULE AGAINST PERPETUITIES — TRUSTS FOR ACCUMULATION DURING MINORITY OF TENANTS IN TAIL. — A testator devised an estate to legal limitations in strict settlement, and provided that during the infancy of any tenant for life or in tail in possession the trustees of the will should enter into possession of the rents and profits, with power, *inter alia*, to hold manorial courts and accept surrenders of leases, maintain the infant and apply the surplus to discharge incumbrances on this and other estates. *Held*, that as the trustees take no legal estate, but simply a power, the minority clause is not void for remoteness. *In re Earl of Stamford and Warrington*, [1912] 1 Ch. 343. See NOTES, p. 656.

SALES — IMPLIED WARRANTIES — WHOLESOMENESS OF FOOD FOR ANIMALS. — In an action to recover the price of food for animals, the defendant pleaded by way of recoupment that the food was decayed and unwholesome for animals. *Held*, that the plea is bad. *Dulaney v. Jones*, 57 So. 225 (Miss.).

Ordinarily the implied warranty of soundness of food applies only when it is intended for human consumption. *Lukens v. Freund*, 27 Kan. 664. But see *Houston Cotton Oil Co. v. Trammell*, 72 S. W. 244, 247 (Tex.). This accords with the statute of 51 Hen. 3, from which the doctrine arose. See *Burnby v. Bollett*, 16 M. & W. 644, 653 *et seq.* The rule rests upon the public policy to preserve health. See *Hoover v. Peters*, 18 Mich. 51, 55. Recovery upon an implied warranty of fitness might be allowed in some states if the seller knew the use to which the goods were to be put. *Preist v. Last*, [1903] 2 K. B. 148; *Houston Cotton Oil Co. v. Trammell*, *supra*; MASS. ACTS AND RESOLVES of 1908, c. 237, § 15. However, in Mississippi the older common-law rule seems still to prevail and there is no warranty if the goods are specified. See *Otto v. Alderson*, 18 Miss. 476. *Cf. National Cotton Oil Co. v. Young*, 74 Ark. 144, 85 S. W. 92.

SALES — RIGHTS AND REMEDIES OF SELLER — MEASURE OF DAMAGES FOR REFUSAL OF BUYER TO ACCEPT STOCK. — The defendant contracted to repurchase stock from the plaintiff at par if it should discharge the plaintiff from its employment. The defendant discharged the plaintiff and refused to take the stock. *Held*, that the plaintiff can recover the par value of the stock. *Strait v. Northwestern Steel & Iron Works*, 134 N. W. 387 (Wis.).

The decision rests mainly upon two Massachusetts cases of executory contracts for the sale of stock. *Thorndike v. Locke*, 98 Mass. 340; *Pearson v. Mason*, 120 Mass. 53. It is interesting to notice that the case upon which these are rested is one of an executed contract in which title had passed, and which expressly repudiates such a result where title has not passed. *Thompson v. Alger*, 53 Mass. 428. There is in some jurisdictions an established doctrine that the seller of personalty may have, even at law, this remedy, which amounts to specific performance. *Dustan v. McAndrew*, 44 N. Y. 72; *Osgood v. Skinner*, 111 Ill. App. 606. And, consistently enough, a court has even ordered that the seller keep the stock until the judgment is satisfied. *Finlayson v. Wiman*, 84 Hun (N. Y.) 357, 32 N. Y. Supp. 347. Several jurisdictions allow this specific performance only where the goods are of a variety not readily salable and to which, therefore, a market price cannot readily be fixed. See WILLISTON, SALES, § 564. And some cases seem to rely upon the fact that a specified block of stock is meant. *Pittsburgh Hardware & Home Supply Co. v. Brown*, 174 Fed. 981; *Reynolds v. Callender*, 19 Pa. Super. Ct. 610. Others, however, allow it as a matter of course, apparently ignoring any limitation of the rule. *Osgood v. Skinner*, *supra*; *Finlayson v. Wiman*, *supra*.

TAXATION — EXEMPTIONS — PROPERTY USED EXCLUSIVELY FOR CHARITABLE PURPOSES. — A fraternal order owned a clubhouse open only to members. In one part of the clubhouse meals and drinks were sold, and the net proceeds devoted to charitable work among the members and the public at large. The state constitution provided that "property used exclusively for . . . charitable purposes . . . shall be exempt from taxation." *Held*, that the clubhouse is exempt. *Salt Lake Lodge v. Groesbeck*, 120 Pac. 192 (Utah).

For purposes of exemption from taxation fraternal orders are generally regarded as charities. *Plattsburgh Lodge v. Cass County*, 79 Neb. 463, 113 N. W. 167; *Hibernian Benevolent Society v. Kelly*, 28 Or. 173, 42 Pac. 3. *Contra*, *City of Bangor v. Rising Sun Lodge*, 73 Me. 428. But where only "purely public charities" are exempt, fraternal orders which confine their benefactions to their own members are taxable. *Philadelphia v. Masonic Home*, 160 Pa. St.

572, 28 Atl. 954; *Morning Star Lodge v. Hayship*, 23 Oh. St. 144. And societies whose chief purpose is mutual benefit or mutual insurance are not regarded as charities. *Young Men's Protestant, etc. Society v. City of Fall River*, 160 Mass. 409, 36 N. E. 57; *Supreme Lodge v. Board of Review of Effingham County*, 223 Ill. 54, 79 N. E. 23. But conceding that the fraternal order in the principal case is a charity, its property is not exempt from taxation unless it be "used exclusively for charitable purposes." If part of a building is rented for business uses, that part is taxable even though the profits are devoted to charity. *City of Indianapolis v. Grand Master*, 25 Ind. 518; *Massenbury v. Grand Lodge*, 81 Ga. 212, 7 S. E. 636. Nor is a building exempt if the charity itself uses it for profit. *American Sunday School Union v. City of Philadelphia*, 161 Pa. St. 307, 29 Atl. 26; *Sisters of Peace v. Westervelt*, 64 N. J. L. 510, 45 Atl. 788. On the other hand, the fact that some income is derived from the use of the property does not render it taxable, if the use be a mere incident of the charitable purpose for which it is maintained. *House of Refuge v. Smith*, 140 Pa. St. 387, 21 Atl. 353; *Franklin Square House v. City of Boston*, 188 Mass. 409, 74 N. E. 675. But it would seem that the use in the principal case does not fall into this latter category. Cf. *Trustees of Green Bay Lodge v. City of Green Bay*, 122 Wis. 452, 100 N. W. 837; *Lacy v. Davis*, 112 Ia. 106, 83 N. W. 784.

TAXATION — PROPERTY SUBJECT TO TAXATION — TAXATION OF FOREIGN CORPORATIONS ENGAGED IN INTERSTATE COMMERCE. — Under a constitutional provision, a Minnesota statute assessed on an express company, organized in New York and engaged in interstate commerce, "a tax of six per cent upon its gross receipts for business done between points within this state, in lieu of all taxes upon its property." *Held*, that this is not void as a regulation of interstate commerce. *United States Express Co. v. State of Minnesota*, U. S. Sup. Ct., Feb. 19, 1912.

An Oklahoma statute assessed on a non-resident express company engaged in interstate commerce a tax of three per cent on such proportion of its gross receipts, "from every source whatsoever," as the portion of its business done within the state bore to the whole of its business, "in addition to the taxes levied and collected upon an *ad valorem* basis upon the property and assets of such corporation." *Held*, that the tax is void as a regulation of interstate commerce. *Meyer v. Wells Fargo & Co.*, 32 Sup. Ct. 218.

The above two cases strikingly illustrate the theory of the United States Supreme Court in cases of this sort. For a discussion of the principles involved, see 25 HARV. L. REV. 95.

TRUSTS — CREATION AND VALIDITY — VOLUNTARY DECLARATION OF TRUST IN LAND WITHOUT TRANSMUTATION OF POSSESSION. — The defendant, being owner of land, made a voluntary written declaration of trust of it in favor of another. *Held*, that this creates an enforceable trust. *Schumacher v. Dolan*, 134 N. W. 624 (Ia.).

In 1811 Lord Eldon, apparently without regarding the previous law, enforced a voluntary declaration of trust of a chose in action. *Ex parte Pye*, 18 Ves. Jr. 140. This case was long regarded as anomalous. See *Scales v. Maude*, 6 De G. M. & G. 43, 51; *Jones v. Lock*, L. R. 1 Ch. 25, 28; 9 HARV. L. REV. 213. But on its facts it is fairly defensible. A chose in action is in general incapable of delivery, and a voluntary assignment of a chose in action was not enforceable in equity, so that by this means alone could there be a valid gift of a chose in action. See *Bond v. Bunting*, 78 Pa. St. 210, 213, 218. The doctrine was soon extended, however, to voluntary declarations of trust in tangible property. *Thorpe v. Owen*, 5 Beav. 224. And the text-books with uniformity make no distinction between lands and personalty. See LEWIN, TRUSTS, 12 ed., 71, 72; 1 PERRY, TRUSTS AND TRUSTEES, 6 ed., § 96; 3 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 997. But no English case has been found applying this doctrine to freeholds. *Con-*

tra, DOCTOR & STUDENT, Dialogue II, ch. XXIII. But *cf. Steele v. Waller*, 28 Beav. 466. The better reasoned cases in this country have refused to apply the doctrine to land. *Pittman v. Pittman*, 107 N. C. 159, 12 S. E. 61; *Thompson v. Branch*, Meigs (Tenn.) 390. *Cf. Yarrowborough v. West*, 10 Ga. 471. The principal case, however, has two square decisions to support it. *Carson v. Phelps*, 40 Md. 73; *Leeper v. Taylor*, 111 Mo. 312, 19 S. W. 955. *Cf. Lynch v. Rooney*, 112 Cal. 279, 44 Pac. 565. And that this will become the recognized rule in this country seems probable. See *Crompton v. Vasser*, 19 Ala. 259, 266; *Reilly v. Whipple*, 2 S. C. 277, 282.

USURY — FORFEITURES — FEDERAL STATUTE: LIMITATION OF ACTION TO RECOVER PENALTY. — A statute provided that in case a greater than lawful rate of interest has been paid, "the person by whom it has been paid . . . may recover back . . . twice the amount of interest thus paid, . . . provided such action is commenced within two years from the date when the usurious transaction occurred." Under this statute the plaintiff sued to recover twice the amount of money he had paid to the defendant, a national bank, as unlawful interest, more than two years before the bringing of the action. The principal debt had been paid within two years before the bringing of the action. *Held*, that the plaintiff cannot recover. *McCarthy v. First National Bank*, 32 Sup. Ct. 240, affirming 23 S. D. 269, 121 N. W. 853.

Since the right of action is based upon the payment of unlawful interest, this is clearly the "usurious transaction" referred to by the statute. *Daingerfield National Bank v. Ragland*, 181 U. S. 45, 21 Sup. Ct. 536. *Cf. Pritchard v. Meekins*, 98 N. C. 244, 3 S. E. 484. Some courts have held that the cause of action does not accrue until a greater amount than the principal debt and legal interest has been paid, on the ground that the law will not apply payments so made to the illegal interest and that the creditor has a *locus pœnitentiæ* until the excess amount has been paid. *First National Bank v. Denson*, 115 Ala. 650, 22 So. 518. *Cf. McBroom v. Scottish Mortgage, etc. Co.*, 153 U. S. 318, 14 Sup. Ct. 852. But there seems to be no warrant for an application of payments by the law to a purpose inconsistent with the appropriation the parties have themselves made. So in an action by a national bank to recover the principal, the debtor cannot be credited with the payments of usurious interest he has already made. *First National Bank v. Childs*, 133 Mass. 248; *Haseltine v. Central Bank of Springfield*, 183 U. S., 132, 22 Sup. Ct. 50. Nor is there any reason for a *locus pœnitentiæ* after the act has been done. In the principal case the Supreme Court finally settles the question by a decision which is sound on principle and is supported by the weight of authority. *Lebanon National Bank v. Karmany*, 98 Pa. St. 65; *First National Bank of Dorchester v. Smith*, 36 Neb. 199, 54 N. W. 254.

WITNESSES — COMPETENCY IN GENERAL — EXCEPTIONS TO DISABILITY OF HUSBAND AND WIFE. — In a prosecution under a statute against a husband for living on the earnings of his wife's prostitution, the wife was tendered by the prosecution to testify against her husband. *Held*, that she could not be admitted as a witness. *Director of Public Prosecutions v. Blady*, 28 T. L. R. 193 (Eng., K. B. D., Jan. 18, 1912). See NOTES, p. 658.

WITNESSES — COMPETENCY IN GENERAL — PRIVILEGE OF HUSBAND OR WIFE WHERE INCOMPETENCY REMOVED BY STATUTE. — A statute provided that in the case of certain offenses, a husband or wife might be called to testify for or against the other without the consent of the party charged. *Held*, that such a witness cannot be compelled to give evidence against his will. *Leach v. Director of Public Prosecutions*, 132 L. T. J. 416 (Eng., H. L., Feb. 26, 1912). See NOTES, p. 658.

WITNESSES — PRIVILEGED COMMUNICATIONS — PATIENT'S COMMUNICATIONS TO DENTIST. — A statute forbade "a person duly authorized to practise physic or surgery" to disclose any information acquired while attending a patient in a professional capacity, necessary to enable him to act in that capacity. The plaintiff, a dentist, was allowed to testify concerning dental work done for the defendant's testator. *Held*, that there is no error. *Howe v. Regensburg*, 132 N. Y. Supp. 837 (Sup. Ct.).

A confidential relationship exists between a physician and patient which statutes like that in the principal case are intended to preserve, so that the patient, to get relief, may tell everything about his condition without fear that such communications will ever be used against him. See *Edington v. Mutual Life Ins. Co.*, 67 N. Y. 185, 194. Technically, dentistry is a branch of physic or surgery. In the *Matter of Hunter*, 60 N. C. 447. See *State v. Beck*, 21 R. I. 288, 293, 43 Atl. 366, 367. But it is difficult to imagine that a dentist's patient would be compelled to make damaging admissions in order to receive proper treatment. Thus, since the reason for the statute does not apply and since in common parlance dentistry is regarded as a separate profession, the decision of the principal case seems proper. See SUTHERLAND, STATUTORY CONSTRUCTION, 2 ed., §§ 367, 395.

BOOK REVIEWS.

WATER RIGHTS IN THE WESTERN STATES. By Samuel C. Wiel. Third Edition. In two volumes. San Francisco: Bancroft-Whitney Company. 1911. pp. xlvii, 967; 969-2067.

On account of the important changes which have been going on in the law of water rights in the western states in the past few years, this work, largely rewritten in view of such changes, which for the first time gives an adequate account of them, and discusses the principles involved, must supersede all our books upon the subject. Happily the work has been done so well that Mr. Wiel's treatise is likely to remain for a long time, as it were, an authoritative text. It has the merit, not common in current texts, of indicating the lines upon which progress is proceeding and should proceed, instead of merely digesting the recent cases and appending them to the views of prior writers. The author has thought critically and independently upon the important problems of the subject, especially upon the new problems arising under recent decisions, and thus has produced a book which deserves to be, and undoubtedly will be, of no little influence upon the case law of the subject.

One may commend especially the discussion of the tendency to depart from a possessory system of acquiring water rights and work out a use system. Undoubtedly the courts are hesitating between the two since many of them are bound by past decisions, if not wholly to the possessory system, at least to more than one consequence thereof. Mr. Wiel points out very clearly the relation of these two systems to the history of the subject, and his demonstration that the one view is historical and the other analytical should have much to do with enabling the courts to depart intelligently from rules which have a purely historical basis. It is to be hoped also that those who draft legislation with respect to water rights in the future will read Mr. Wiel's discussions carefully so that legislation will not waver between the two theories.

Another commendable discussion has to do with the recent tendency to recognize something very like riparian rights through perceiving that the owner

along the stream has a natural advantage which enables him to use the water to more purpose than owners remote from the stream. The decisions and legislation with respect to "sub-irrigation" and appropriation by improvement of natural surroundings which depend upon the flow of the water show that the common law was by no means wholly inapplicable even to our arid regions and that the judicial experience involved in the doctrine of riparian rights could not after all be entirely rejected.

A writer upon the law of irrigation at present is in truth compelled to write from two standpoints. On the one hand he must develop the law of appropriation founded upon a possessory system as it has existed in the past; on the other hand, he must develop the subject from the standpoint of the use system, which partially through legislation, but even more through judicial decision, is steadily gaining ground. If this were done in the conventional way, by writing wholly from the standpoint of the old law, and appending the recent decisions in the notes as stating conflicting rules or as indicating mere isolated departures in particular instances, the work would be worth no more than a digest. It is matter for congratulation that the author has seen clearly that two competing theories are in conflict here, has developed the one thoroughly out of the older cases and the recent cases which apply them, and has fitted the newer cases proceeding upon the newer theory into their place in a proper development of that theory and indicated the results to which that theory is likely to lead. Text-books developing the law in this manner are a significant and encouraging sign in American legal thought.

It might be suggested that the division of western states where the law of irrigation is in force into two classes, namely, those which apply the California doctrine of riparian rights on the private domain and of appropriation on the public domain, and those which adhere to the Colorado doctrine of appropriation throughout the entire jurisdiction, is not wholly adequate. Are there not in reality three classes of jurisdictions? In one class the appropriation system is in force on the public domain, while the common law is in force on private lands, but appropriations made on the public domain are valid against subsequently acquired riparian rights. In a second class the common law was originally in force over the whole jurisdiction, but statutes have subsequently introduced the appropriation system potentially for all or a part of the state. In a third group the appropriation system obtains exclusively over the entire domain, and has usually so obtained from the beginning. A distinction between the first and second classes seems to be necessary in that in the second group rights were acquired under the common-law doctrines which were in force for many years before the appropriation system was introduced or given sanction by legislation. In these jurisdictions a number of serious constitutional questions have arisen, and appropriations which may be made throughout the state must be subject to previously acquired riparian rights except as the latter are divested by some sort of condemnation. If a distinction is made between these jurisdictions, as, for example, the Dakotas, Kansas, and Nebraska on the one hand, and California, Montana, and Washington on the other hand, where practically from the beginning both riparian rights and appropriation have been co-existent, a number of apparent difficulties disappear.

It is a small matter, but a tantalizing method of cross reference by citing the reader to sections where the proposition in question is fortified by a further cross reference is employed too frequently.

R. P.

HANDBOOK ON THE LAW OF PARTNERSHIP. By Eugene Allen Gilmore. St. Paul: West Publishing Company. 1911. pp. xiii, 721.

This book is one of the best of the Hornbook Series. It was at first intended as a second edition of *George on Partnership*, but so much of the material is new and so much of the earlier treatise is abandoned that the new title is amply justified. The chapters on Actions between Partners and Actions between Partners and Third Persons are substantially taken from the earlier work, but both the arrangement and text of the other chapters are almost entirely new.

Professor Gilmore has not attempted to contribute to the philosophy of the law of partnership but he has analyzed and stated clearly and, for the most part accurately, the present state of the law on this subject as it is administered to-day in this country. Occasionally his statements are rather too general and therefore inaccurate. Thus, in referring to the general doctrine of equitable conversion, he states on page 154 that if the owner "has indicated his intention to alter his real property into personal property or his personal property into real property, equity will treat the property as though the intention had been carried out." Certainly, the mere intention of the owner, even his expressed intention, is insufficient to work a conversion. Indeed, Professor Gilmore shows in his application of the doctrine to partnership property that the conversion is the result of the nature of the rights of the partners in the partnership property and is not merely dependent upon intention.

The book is very fully annotated and about five thousand cases are cited. The author has very ably fulfilled his purpose of making a clear and definite statement of the leading principles of the law of partnership so far as the scope of the work permits.

A. W. S.

A HISTORY OF THE AMERICAN BAR. By Charles Warren. Boston: Little, Brown and Company. 1911. pp. xii, 586.

No single volume could fairly be expected to square with the title of this book. There is a careful, fairly balanced, detailed account of the bars of the different colonies. Each is distinct, yet the reader can readily follow the tendency toward unity, toward a real American Bar. No easy task is this for an author, for the several necessary geographical subdivisions mar continuity of narrative. The influence of the English Bar of the time is properly emphasized. It bore intimate relation to the violent and distorted popular reactions against the English common law, its lawyers, and its judges. Incidentally the details of the rise and fall of such attacks may carry balm to those who look with too serious alarm upon recent symptoms of this recurring distemper.

The second half of the book does not attempt to cover the field in order, but sends out independent but effective scouting parties to examine the most significant features of our legal history from 1789 to 1860. This part is specifically labelled "Federal Bar"; but is more comprehensive than the title indicates. Besides the federal bar, the bars of the states are described, notably those of New York and of Massachusetts. In a general discussion of what the author calls the progress of the law, 1830-1860, in the list "of the Chief Justices who have left a marked impress upon the course of legal development" (p. 447), seven Chief Justices of states are named. The name of Thomas Ruffin is, however, not among them.

The origin and infancy of railroad law, corporation law, insurance law, personal injuries law, are sketched with care and skill. Of the evolution of legal education, of the exotic called codification, of the writing of modern law books,

and of the deep-going changes in the mental habits of the legal profession produced thereby, the author's vein is at its richest.

Lord Campbell, writing of a compact, highly organized class in a territory forming only a tiny fractional part of this author's field, with many volumes at his disposal, has fixed the average reader in the belief that his legal history is to be learned most readily through biography. "Great American Lawyers," in spite of the diversities of style and matter within its volumes, has not dispelled the idea. But in a single volume one will not ask for more than we have here.

S. M.

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LIMITATIONS OF THE STATUTORY POWER OF MAJORITY STOCKHOLDERS TO DISSOLVE A CORPORATION.

AMONG the "incidents which, as soon as a corporation is duly erected, are tacitly annexed of course," Blackstone names first that "to have perpetual succession."¹ This theoretical right of perpetual succession must in its origin have been subject to certain implied limitations, although it was seriously contended in the celebrated case of *King v. Mayor, etc. of London*² that immortality was an attribute of corporate life.

The cases and the manner in which a corporation may be dissolved are said by Blackstone to be the following:

"(1) by act of Parliament, which is boundless in its operations; (2) by natural death of all the members, in case of an aggregate corporation; (3) by the surrender of its franchises into the hands of the King, which is a kind of suicide."³

Kyd not only recognizes the implied power of voluntary dissolution, but proceeds to tell precisely how it may be brought about:

"In the nature of the thing there does not seem to be much metaphysical difficulty. That a corporation may, in point of fact, destroy itself by its own act seems as easy to be comprehended as that a natural

¹ 1 Bl. Comm. 475.

² 2 Show. 263 (1683).

³ 1 Bl. Comm. 485.

person may put an end to his life by his own hands. The acting part of the corporation put the common seal to a deed of surrender; carry up all their charters to St. James's and lay them at the King's feet; procure the surrender to be enrolled, and desert all their corporate functions: must not the consequence be that in a little time the corporate existence must be at an end?"⁴

The "acting part" of a corporation, the consent of which was necessary to dissolution, may be assumed to have embraced all who had any legal interest in the continuance of the life of the corporation. That this was so as regards membership corporations was held by Vice-Chancellor Bruce in 1845 in the case of *Ward v. Society of Attornies*.⁵

It is well established that, in the absence of an enabling statute, there is no power in the majority of the stockholders of a solvent, prosperous stock corporation to dissolve it against the protest of a single stockholder.

The leading American case upon this subject is *Kean v. Johnson*,⁶ decided by the New Jersey Court of Chancery in 1853. That was a case of the sale of all the property of a railroad corporation under a statute, passed after the incorporation, purporting to authorize such a sale "with the consent of the stockholders." It was held that the statute required unanimous consent, and that a statute in terms permitting a sale upon consent of a majority would have been of no effect. The master's opinion then lays down the rule that the contract of the stockholders is that the funds contributed by them shall be employed in the business specified in the charter for the time fixed, and, when no time is limited by the charter, so long as the affairs of the company prosper, unless all consent to an earlier termination of the venture.

The doctrine of the New Jersey decision has been accepted generally by the courts of other states, and is thoroughly imbedded in our jurisprudence. In most of the decisions founded upon *Kean v. Johnson* the action or proposed action of the majority questioned by the minority consisted of the sale of all or substantially all of the property of a corporation without judicial or other proceedings for the extinguishment of the corporate franchises. These and cases of dissolution are so closely analogous that they

⁴ 2 Kyd, Corporations, 465.

⁵ 1 Coll. 370.

⁶ 9 N. J. Eq. 401.

may fairly be treated together.⁷ In the apparent exceptions to this rule there usually will be found some element which made the continuance of the enterprise hazardous or impossible.⁸

With the adoption by the states of general laws for the formation and management of stock corporations, there was usually prescribed by statute a method by which corporations so formed might be voluntarily dissolved. In some cases the method prescribed was a judicial proceeding brought by the attorney general at the request of a prescribed proportion of the stockholders or by the stockholders directly. Sometimes the dissolution was accomplished by action of the directors acting alone or with the stockholders. The more common method is by simple vote of the stockholders, resulting in the extinguishment of the corporate existence, to be accompanied or followed by the sale of the corporate assets, payment of the debts, and the distribution of the remainder of the proceeds among the stockholders by the directors, who are usually constituted trustees for that purpose. The last-mentioned method is the one now generally in effect, and under it have arisen most of the litigated controversies which will be chiefly the subject of the present discussion.

Looking to the conditions under which these statutes were enacted to learn the reasons for the legislation and its purpose, it seems reasonably clear that the object of embracing in general corporation laws a provision for dissolution was to enable the major-

⁷ *Abbot v. American Hard Rubber Co.*, 33 Barb. (N. Y.) 578 (1861); *Denike v. New York, etc. Co.*, 80 N. Y. 599 (1880); *People v. Ballard*, 134 N. Y. 269, 32 N. E. 54 (1892); *Byrne v. Schuyler Electric Mfg. Co.*, 65 Conn. 336, 31 Atl. 833 (1895); *Banks v. Judah*, 8 Conn. 145 (1830); *Forrester v. Boston, etc. Copper, etc. Co.*, 21 Mont. 544, 55 Pac. 229, 353 (1888); *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 42 (1858); *March v. Eastern R. Co.*, 43 N. H. 515 (1862); *Boston & Providence R. Co. v. New York, etc. R. Co.*, 13 R. I. 260 (1881); *Nathan v. Tompkins*, 82 Ala. 437, 2 So. 747 (1886); *De la Vergne, etc. Co. v. German Savings Institution*, 175 U. S. 40, 20 Sup. Ct. 20 (1899); *Easun v. Buckeye Brewing Co.*, 51 Fed. 156 (1892); *McCutcheon v. Merz Capsule Co.*, 71 Fed. 787 (1896).

In *Matter of Timmis*, 200 N. Y. 177, 93 N. E. 522 (1910), it was held that the directors and majority stockholders had no power to sell out an important department of a corporation's business, the court saying that such a sale involved the going out of business *pro tanto*.

⁸ The Supreme Judicial Court of Massachusetts adopted a contrary rule in *Treadwell v. Salisbury Mfg. Co.*, 7 Gray (Mass.) 393 (1856), but even in that case the decision was in part based upon the condition of the corporation's affairs.

ity to bring the enterprise and the life of the corporation to an end whenever, for any reason, they might desire to withdraw their capital and to quit the venture.

The tendency of human affairs to become complicated — by no means diminished when the interests of many converge, as in the case of an enterprise conducted by a stock corporation — and the inclination of man to seize and apply any available instrument to his present purpose without regard to whether or not the instrument was originally designed for that purpose, have produced cases in which these statutes have been made to play a part which seems outside their original scope.

Among the ulterior objects which it has been sought to accomplish through a formal or pretended dissolution are: (a) unauthorized consolidation with another corporation; (b) reorganization in order through a new corporation to enter upon undertakings *ultra vires* of the existing corporation; (c) reorganization for the purpose of eliminating contentious or uncongenial stockholders; (d) sale to majority stockholders or a corporation controlled by them for the purpose of defrauding the minority of their interest; (e) the extinguishment of contracts beneficial to the corporation but burdensome to the majority stockholders.

That there can be no consolidation of corporations except as authorized by a statute existing at the time of their formation, or pursuant to power reserved for that purpose, is plain: first, because consolidation involves the creation, transfer, or extinguishment of corporate franchises, which depend upon legislative grant; and, second, because the agreement among the stockholders is that the capital contributed by them shall be employed in the corporation in which they actually invest, and not in *any* corporation, with any objects, powers, or capital. It would be strange if these conditions could be supplied or dispensed with by a statute which on its face was passed for the single purpose of permitting dissolution.

The statement that an undertaking is *ultra vires* implies that the stockholders have never consented to engage in it. It is not to be questioned that dissolution statutes afford stockholders a method of withdrawing their capital from the particular enterprise for which a corporation was chartered, with liberty to employ it in any other, however different; but this is far from permitting a ma-

jority to take with them into new fields the property or good-will of the corporation, compelling the minority, under the form of a dissolution, to join them, or to take their distributive share of a fund which it is the majority's interest to make as small as possible.

There are cases in which it is sought to distinguish an attempt, by a colorable dissolution, to force a stockholder to abandon his interest in an enterprise or to raise capital enough to buy the entire property at a sale fairly conducted, and a similar transaction in which some deception or trickery is practiced. There can be no valid distinction between such cases, except in the mere classification of the majority's action as legal or moral fraud; and, if the transaction is tainted by either, it cannot stand.

The question of law presented in all these cases is substantially the same: May a majority of the stockholders, against the protest of the minority, by merely observing statutory forms, dissolve a corporation, and by a transfer of the physical properties or good-will to themselves or to another corporation continue the business freed from the limitations of the charter under which the enterprise was undertaken?

An attempt by the majority to cancel a contract which their interest as stockholders would preserve, but which their interest as individuals leads them to destroy, raises questions in their nature different from those that have been discussed. The separate interest of the majority as contractors introduces a new element. Such cases are, however, controlled by a like principle. The implied agreement that the affairs of the corporation shall be conducted as the majority shall determine, is conditioned upon the power of the majority being exercised in the interest of the corporation and of the stockholders as a whole. That a stockholder should be permitted, through his ownership of a majority of the shares, to release a debt due from himself to the corporation, is unthinkable; and no reason is apparent why the same result, accomplished by a dissolution, is any less a fraud upon the rights of other stockholders.

One of the first cases involving an attack upon the sale of a corporation's property through dissolution proceedings arose in the circuit court of the United States in 1886.⁹ In that case there

⁹ *Ervin v. Oregon Ry. & Nav. Co.*, 27 Fed. 625.

appears to have been a regular statutory dissolution, followed by a sale of the corporation's property to a new corporation formed by a majority of the stockholders for the purpose of acquiring it. The minority stockholders were excluded from further participation in the enterprise, and were limited to their proportionate share of the proceeds of the sale. The case was in part disposed of upon the ground of unfairness in the method of appraisal and inadequacy of the price, and the relief granted to the minority took the form of money damages; but Judge Wallace declared that dissolution pursuant to a preconceived scheme of the majority stockholders to acquire the corporation's property and continue the business in their own interest was none the less a fraud "because accomplished by the agency of legal forms," saying:

"The defendants have adjusted their own interests on the basis of a consolidation of the two corporations and a continuance of their business as a joint venture; but they now insist that the interests of the minority stockholders, who have not been permitted to participate with them, shall be adjusted on the basis of a dissolution, and cessation of the business which they originally associated together to conduct. . . . They repudiate the suggestion of fraud, and plant themselves upon their right to control the corporate interests according to their discretion. They err if they suppose that a court of equity will tolerate a discretion which does not consult the interests of the minority. . . . It is of the essence of the contract [of incorporation] that the corporate powers shall only be exercised to accomplish the objects for which they were called into existence, and that the majority shall not control those powers to pervert or destroy the original purpose of the corporators."

Since Judge Wallace's decision in the Ervin case a number of cases have arisen in the state courts in which a different view has been taken of the majority's powers under dissolution statutes. In two of these cases¹⁰ the corporation dissolved was a national bank, and in each case the holders of a majority of the stock had under a colorable dissolution taken to themselves the business and goodwill of the bank, limiting the minority to their distributive share of the tangible assets. *Slattery v. Greater New Orleans Realty, etc. Co.*¹¹ presented a similar controversy in the case of a trading

¹⁰ *Watkins v. National Bank of Lawrence*, 51 Kan. 254, 32 Pac. 914 (1893); *Green v. Bennett*, 110 S. W. 108 (Tex. Civ. App., 1908; writ of error granted by Supreme Court).

¹¹ 128 La. 871, 55 So. 558 (1911).

corporation.¹² In all these cases it was held that where dissolution is ordered by the prescribed vote of stockholders, and the sale is fairly conducted, the minority may not complain even if the dissolution is but a step in a preconceived plan of a part of the stockholders to continue the business, and the use of the same property, in their own interest.

The decision of Judge Kirkpatrick in *Windmuller v. Standard, etc. Co.*¹³ has received special attention because of the extreme hardship that the minority stockholders suffered by the application of the rule that equity will not interfere with the exercise of a statutory right, except to prevent or redress fraud. In that case it appeared that the holders of the preferred and common stock of a manufacturing corporation had transferred all the common stock of their company to a holding company, in consideration of which the holding company guaranteed the payment of certain dividends upon the preferred stock of the manufacturing corporation during the existence of the latter, which seems to have been unlimited, except by a provision of a statute permitting corporations to go into voluntary dissolution upon vote of two-thirds of their stockholders. The holding company paid the guaranteed dividends for some years, and then, finding the contract of guaranty burdensome, proposed that the manufacturing corporation be dissolved. By the transfer of the complainants' shares of common stock the holding company had acquired control of the manufacturing company, including the voting power required by statute to dissolve the corporation. Thus it could, if this voting power were absolute, cancel the contract of guaranty at will by putting an end to the life of the manufacturing company. The court held that, in the exercise of his power to vote, a stockholder, even one holding a majority of the stock of a corporation, may disregard all interests but his own; and that, in the case presented, the complaining stockholders must be deemed to have accepted the contract of guaranty subject

¹² In *State v. Chilhowee Woolen Mills Co.*, 115 Tenn. 266, 89 S. W. 741 (1905), the corporation had not acquired any property or begun business operations. *Elbogen v. Gebereux Flynn Co.*, 50 N. Y. App. Div. 623, 64 N. Y. Supp. 1 (1900), and *Treadwell v. United Verde Copper Co.*, 134 N. Y. App. Div. 394, 119 N. Y. Supp. 112 (1909), were disposed of upon the ground of estoppel; but in the latter case judgment dismissing the complaint was conditioned upon a tender being made to the plaintiff of his proportionate share of stock in the reorganized company.

¹³ 114 Fed. 491 (1902).

to its extinguishment at the will of the guarantor. Despite the harshness of the result in this case, it is to be observed that the contract which was canceled by the dissolution was one between the holding company and the stockholders of the manufacturing company in their individual capacity; and a contrary decision must have rested upon the principle that it is one of the implied terms of every contract that a party shall do nothing to render his own performance impossible, and not upon any right or obligation peculiar to the relation of stockholder.

The gist of these decisions is, that dissolution statutes confer upon a given proportion of stockholders an unqualified right; that these statutory provisions enter into the contract of incorporation, and limit the interest of every stockholder; that the power to dissolve, being absolute, cannot be affected by the motive of the stockholder; and that accordingly, in the absence of actual fraud, the exercise of this power is not subject to judicial review.

This is not entirely satisfying as logic, and as an expression of judicial impotence is the reverse of impressive.

It would not be difficult to adduce illustrations of the proposition that an act which, standing alone, is neutral or indisputably legal, may be obnoxious to the law when considered as a part of a general scheme or course of action which has for its end the working of a wrong. Nor is it invariably true that a wrongful motive can never invalidate an act otherwise valid. A familiar example, sufficient to disprove the existence of such a rule, is the case of a conveyance by an insolvent debtor, the validity of which is determined by the intent of the parties.

Why any peculiar sanctity should attach to a vote by stockholders, even when given in the exercise of a statutory right, is not clear. Judge Sanborn's opinion in the case of *Jones v. Missouri-Edison Co.*,¹⁴ in the Circuit Court of Appeals, contains an intimation that this judicial timidity in dealing with the result of stockholders' votes grows out of a misapplication of the rule that neither the existence of a corporation nor the right to the exercise of corporate franchises can in general be questioned except by the state. That was a case in which the holders of a majority of the stock of a corporation, in pursuance of a statute, as well as of a preconceived scheme to benefit themselves at the expense of the minority, had

¹⁴ 144 Fed. 765 (1906).

voted consolidation with another corporation whose stock they owned. The court held that the consolidation was a fraud in law upon the minority stockholders, an abuse of the fiduciary relation which the majority stockholders bore to the minority, and was voidable at the suit of the corporation or of a stockholder. It was further held that the general rule regarding the invulnerability of corporate franchises had no application to a suit by a minority stockholder, to avoid for fraud or breach of trust an act of consolidation and to restore to the corporation injured, or to its stockholders, the franchises and property transferred to the consolidated company.

*Barrett v. Bloomfield Savings Institution*¹⁵ was a suit by a depositor in a savings bank to enjoin the voluntary dissolution of the savings bank for the purpose of transferring its accounts and good-will to a trust company formed by the trustees. In granting an injunction Vice-Chancellor Pitney said:

"They [the trustees] had no more right, by any sort of contrivance, to destroy the entity of the corporation while transferring to themselves its most valuable asset — its good-will — than an ordinary trustee of property has to purchase the property himself, though paying a fair price for it."

Theis v. Spokane Falls Gas Light Co.,¹⁶ decided by the Supreme Court of Washington in 1904, was a stockholder's suit brought originally to enjoin a sale of the property of a corporation and to annul dissolution proceedings alleged to have been taken by the holders of a majority of the stock as a part of a scheme to eliminate the plaintiff as a stockholder, to acquire the corporation's property and continue its operation in their own interest. A motion to enjoin the sale was denied, after which the property was sold and bought by a representative of the majority stockholders and conveyed to a corporation formed in their interest. The plaintiff then filed a supplemental complaint, bringing in the purchasing corporation as a defendant. The Supreme Court reversed the decision of the lower court, and directed judgment not only setting aside the sale, but annulling the dissolution proceedings.¹⁷

¹⁵ 64 N. J. Eq. 425, aff'd in 66 N. J. Eq. 431, 54 Atl. 543 (1903).

¹⁶ 34 Wash. 23, 74 Pac. 1004.

¹⁷ The following extract from the court's opinion by Dunbar, J., is pertinent to the present discussion:

"The real question to be determined here is, whether or not the statute confers

In the case of *White v. Kincaid*¹⁸ the Supreme Court of North Carolina reversed an order granting an injunction, upon the ground that there was no proof in the record of any scheme by the majority to buy the property of the corporation or otherwise to oppress the minority, beyond the mere fact that dissolution was resolved upon; but the court expressly recognized the limitation of the majority's powers under a dissolution statute to a winding up in good faith.

A very recent decision by the New Jersey Court of Errors and Appeals in *Riker v. United Drug Co.*¹⁹ is of special interest, for the

power upon a two-thirds majority of a prosperous corporation to disincorporate and dispossess minority stockholders of their stock by paying them the market price for the same. . . . Under the provisions of this statute, it is the contention of the respondents that an absolute right is given a two-thirds majority to dissolve the corporation whenever they see fit; and the broad ground is taken, that, inasmuch as the corporation is acting within its legal capacity, the court has no right to inquire into the motive which actuated the moving stockholders; that its only concern is to see that the formal legal requirements have been complied with; and such was evidently the theory adopted by the trial court. This, in a sense, is true, and would apply to this case if the actual attempt was to dissolve the corporation, within the meaning of the law. But a court of equity will never aid in the perpetration of a fraud simply because application is made in empty form of law. Its powers are not so superficial, or so restricted. . . . A dissolution of a corporation within the contemplation of the law is the death of the corporation. It means a disintegration, a separation, a going out of business. But in this case, all of the elements of the dissolution are wanting. The corporation, with a slightly different name, proceeded in the same town, with the same property, the same powers, and substantially the same owners. All the difference is about what was testified by the president of the corporation that, after the new company was formed, the minority stockholders' interest would be represented by a deposit in the bank instead of stock in the corporation. It might with as much reason be concluded that a man could escape responsibilities by changing his name, and that, by such change, his moral or financial relations with those with whom he was engaged in business under the old name would be affected. It is not enough to say that appellant received all his stock was worth. He embarked in this business, and had a right to stay in the business during the expressed life of the corporation, or until it was dissolved by a fair compliance with the law."

Upon the practical effect of a construction permitting reorganization under color of dissolution, the court said:

"The result of a successful practice such as is attempted here will be that minority stockholders will always be at the mercy of the majority. If the enterprise fails, they bear their proportion of the losses. If, on the other hand, it succeeds, as soon as it passes the experimental stage, and the opportunity is presented to finally reap the reward of a judicious investment, they are coolly ejected from the corporation by a majority of the stockholders, who appropriate to themselves the accruing profits. In other words, they might be termed experimental dupes, who are subjected to the necessity of contributing to the losses, but denied the privilege of sharing the profits."

¹⁸ 149 N. C. 415, 63 S. E. 109 (1908).

¹⁹ 82 Atl. 930 (N. J., 1912).

reason that the case presents the question of the nature and extent of the statutory power to dissolve unembarrassed by the element of fraud, except in the legal sense of an attempt by open methods to work a change in legal relations without warrant of law. The decision is unique also in directly enjoining the exercise by stockholders of the voting power of stock admittedly owned by them and unaffected by any agreement except that contained in the charter of the corporation.

According to the New Jersey statute, dissolution is had by vote of the directors declaring such action advisable, followed by vote of the stockholders at a meeting called by the directors for that purpose. The directors adopted a resolution in favor of dissolution, and called a meeting of the stockholders to vote upon the question. Before any action by the stockholders, the suit was begun, attacking the transaction upon the ground that the proposed dissolution was one in form only, it appearing that the dissolution proceedings were being taken as a part of a plan by the majority to transfer the property to a corporation newly formed in another state for the purpose of continuing the business. This case was free from any question of discrimination against the minority, for they were invited to share in the stock of the new company equally with their fellow stockholders. Upon appeal the majority stockholders earnestly contended that whatever relief might be granted the minority by way of safeguarding their interests at the sale, it was an unheard-of thing and beyond the judicial power to interfere with the statutory right of the majority to vote according to their inclination or interest.

The appellate court held the entire scheme to be outside the scope of the statute permitting dissolution, and found no difficulty, metaphysical or practical, in preventing the proposed action by enjoining the directors from submitting the proposal to the vote of the stockholders. In his opinion Chief Justice Gummere said:

"The proposed plan for the so-called 'reorganization' of the defendant company is, therefore, in violation of the law of the state whose creature it is; and, this being so, any stockholder who refuses to consent thereto is entitled to the aid of a court of equity to prevent its being carried into execution. Each stockholder of the company owns a share in its property and assets, and is entitled to have a proportionate share in its profits. They have invested their capital in it, and in it alone; and

they are entitled to every dollar that it earns. This is the agreement of the stockholders among themselves. They each contract with the other that their money shall be employed for the purposes specified in the certificate of incorporation, and for no other purpose, and that the profits of the enterprise shall be ratably apportioned among them. In the absence of legislation permitting a variation of the provisions of this fundamental contract, by vote of a majority of the stockholders, no majority, however large, has a right to divert any part of the joint capital, however small, to any purpose not consistent with and growing out of this original, fundamental agreement. The scheme, in the carrying out of which the dissolution of the company is a proposed step, is a fraud upon the statute (the word is used in a legal, not moral, sense); and every act done in furtherance thereof, no matter whether it be legal, standing alone, or not, is equally a fraud upon the statute."

The case of *Theis v. Durr*²⁰ presented a question analogous to that involved in the dissolution cases. That was a suit by minority stockholders to annul the proceedings of the holders of a majority of the stock in voting to reduce the capital stock of the corporation. The plaintiffs had paid for their stock in full, and the defendants had paid only part of their subscriptions. The defendants, holding a majority of the stock, refused to call in the unpaid subscriptions, and borrowed money to meet the current obligations of the corporation. It was shown that the proceedings for reduction of capital stock, though regular in form and in conformity to statute, were taken to relieve the majority stockholders from liability on their subscriptions. It was held that although the proceedings for reduction, standing alone, might be regular and valid, a court of equity had power to look to the purposes of the majority, and where the mainspring of the transaction was an ulterior motive, which if given effect would work a wrong to the corporation or minority stockholders, the entire proceedings would be annulled.

Dissolution statutes very generally provide for a sale of a corporation's assets and distribution of the proceeds under the supervision of the existing board of directors, who are constituted trustees for the purpose of settling the corporation's affairs. It seems a matter of course that in all such cases the trustees are debarred from purchasing from themselves, or at least that any sale

²⁰ 125 Wis. 651, 104 N. W. 985 (1905).

to the trustees or to a corporation controlled by them is voidable at the suit of a stockholder.²¹

Even where the technical relation of trustee does not exist, it is undoubtedly the law that the majority stockholders, who have the power to elect directors, bear to the corporation and to minority stockholders a relation fiduciary in its nature to the extent that their action is subject in equity to judicial scrutiny and review.²²

The familiar and now universal rule by which each stockholder of a corporation has as many votes as he owns shares, is statutory. At common law the members had equal voting power; and it has been held that, in the absence of a statute on the subject, the common-law rule applies to stock corporations.²³ The common-law rule, although an arbitrary one, and doubtless imperfect in its operations, gave to the corporation the benefit of the judgment and interest of every member. Perhaps a perfect rule would have allotted to each member a voting power commensurate with his virtues and abilities. Among other changes wrought by the invention of the corporation with a capital stock divided into shares, was a diversity in the quantity of the interest of members, due to the fact that one person might be the owner of a number of shares. Since the stock corporation has been from its origin almost exclusively an instrument of commerce, it was to be expected that any change in the basis of voting power should take account of this diversity of interest, but according to the rule as generally established by statute, voting power is based solely upon interest. It results from this rule that the owner of a bare majority of the shares of a corporation, however numerous or wise or virtuous the holders of the remaining shares may be, has the exclusive power to enact

²¹ *Chicago Hansom Cab Co. v. Yerkes*, 141 Ill. 320, 30 N. E. 667 (1892); *Cumberland Coal & Iron Co. v. Sherman*, 30 Barb. (N. Y.) 553; *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456 (1860).

²² *Farmers' Loan & Trust Co. v. New York, etc. R. Co.*, 150 N. Y. 410, 44 N. E. 1043 (1896); *Barr v. New York, etc. R. Co.*, 96 N. Y. 444 (1884); *Memphis & Charleston R. Co. v. Woods*, 88 Ala. 630, 641, 7 So. 108, 112 (1889); *Wright v. Oroville Mining Co.*, 40 Cal. 20 (1870); *Jackson v. Ludelling*, 21 Wall. (U. S.) 616 (1874); *Wardell v. Railroad Co.*, 103 U. S. 651 (1880); *Meeker v. Winthrop Iron Co.*, 17 Fed. 48 (1883); *Sidell v. Missouri Pacific Ry. Co.*, 78 Fed. 724 (1897); *Jones v. Missouri Edison Co.*, 144 Fed. 765 (1906); *Wheeler v. Abilene Co.*, 159 Fed. 391 (1908); *Menier v. Hooper's Telegraph Works*, L. R. 9 Ch. 350 (1874); *Noyes, Interporate Relations*, § 300.

²³ *Taylor v. Griswold*, 14 N. J. L. 222 (1834).

by-laws, to elect directors, and through them to select officers, to determine the policy of the corporation, and to conduct all its affairs. The only limitation of these powers is that they shall be exercised for the attainment of the objects for which the corporation was chartered, and in the interest of the corporation and all of its stockholders. In addition, he is invested by special provisions of statute with the extraordinary powers of amending the charter, of increasing or decreasing the amount of the capital, of consolidating the corporation with another corporation, and even of bringing the life of the corporation to an end whenever he may decide to withdraw from the enterprise. The possibilities of abuse of the power of majority stockholders to control the property and affairs of others are such that it is likely that the development of the law of corporations must for some time be largely in the direction of limiting the powers of the majority and of safeguarding the interests of the minority. For the present it does not seem too much to require that these extraordinary grants of power shall not be stretched to cover purposes for which they never were designed.

The later decisions which seem to limit the absolute character of the voting power of majority stockholders, when applied to dissolution under statutes, may, it is thought, be sustained upon the narrow ground that these statutes were enacted for a specific purpose, and cannot be perverted to any other use. Given a more general application, the decisions commend themselves as a vindication of the ancient power of equity to pierce forms and shams, to lay bare the controlling realities, and to enforce justice.

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WRITTEN EVIDENCE AND ALTERATIONS.

FOR centuries the law has rightly preferred written instruments to oral testimony as evidence on a disputed point. One of the difficulties often encountered in dealing with writings as evidence is the question of their genuineness. In the last analysis if the document has been altered in a material part without the assent of the parties to it, however genuine it may look to be, it is not, in fact, genuine. In the trial of a case, therefore, we first look to see if the document is genuine and, as a part of the question, consider whether it discloses any alteration, in any material part, not authorized by the parties.

For the purpose of determining if the document is genuine as a preliminary to determining if it has been altered we necessarily resort to many tests seldom disclosed in the works on evidence and difficult to find in the reported cases. Hundreds of years ago when but few of our ancestors could write, they had peculiar marks that they made at the end of the document, or they had signet or other rings which they impressed upon the sealing wax so that either the mark or the seal identified the party who could not write his name. In those cases the act of making the mark or stamping the seal was witnessed by one or more witnesses who could write their names. Most documents of age still disclose evidence of the party's mark, his seal, and witnesses to the mark or the seal. Now, however, the acknowledgment and the recording act have taken the place of such proofs of genuineness. Nevertheless, the acknowledgment and the recording act are by no means proof against alterations, nor are they indubitable proofs of genuineness. Then, too, in a large number of cases the writings are never sealed, are never acknowledged, and are never recorded. So long as those writings were in the handwriting of the party, that handwriting in its individual peculiarities was a strong means of identifying the writing as genuine. Now, however, stenographers and typewriters have come into vogue to such an extent that the signature alone is all we have to prove the genuineness of the writing in a great many cases. And it is so easy to fill in a few words or a sentence or two above the signature, or to pick up a blank piece of paper upon which

a person has written his signature to try the pen and afterwards typewrite a document over that signature, that genuineness and alterations become new problems in evidence. If the document is typewritten above the genuine signature of the person, it may be that a letter out of alignment in the typewriter will show either that the document is genuine or that it is not, according to whether or not the typewriter employed in the office of the person signing the document did or did not betray that particular peculiarity at the time the writing was apparently signed. Then, too, the bulk of the commercial paper of the day, checks, notes, drafts, and the like, are upon printed or lithographed forms in common use or in use in particular establishments, and our only proof of genuineness is the signature of one or more persons at the bottom of the document. Often, unfortunately, a person may be a very busy person and may either resort to an engraved signature or a rubber-stamp signature, or, worse still, to a simulated signature of a secretary who reproduces the genuine signature so faithfully that it is difficult for the most expert to tell the difference between the signature of the secretary and the signature of his principal.

The old tests for alterations are no longer sufficient to meet all the new conditions. More scientific tests have become necessary and have come into common use. Forty years ago the common method of trying the question of whether or not the document was genuine was to call some person who had seen the person in question write, or call some banker who knew the signature of the person, or some banker who had compared genuine writings or signatures of the person with that in dispute, and then to take the opinion of the witness as to whether or not the writing or the signature was genuine. In cases of any importance these methods have almost ceased to be used. It is now very rare that a person is called to testify to handwriting or to a signature just because he knows the handwriting or the signature of the person in question. It is almost equally rare in important cases to rely upon the testimony of the banker who knows the signature of the person in question. So, too, it is now rare that a banker is called as an expert in handwriting to compare genuine writings and questioned writings to determine whether or not the questioned writing is genuine. Instead, expert photographers photograph the ques-

tioned document, and large photographs properly made often disclose much as to whether or not the writing in question was performed in the ordinary way. The photograph may show fairly well certain strokes of the pen that the person writing the document or writing his own name would not have made, but that were evidently made for the purpose of making the simulated writing or signature more perfect. A careful examination of the paper, too, by watermark or otherwise, may disclose that the paper was of a manufacture subsequent to the date of the document, or that the paper was of a kind that the person never used, or like facts about it. The expert to-day carefully measures the disputed signature to see if its measurements betray any peculiarities that will help solve the mystery. The ink is carefully examined, because it may appear that the ink is of a kind never used by the person in question, or of a kind not manufactured until long after the signature came into existence. So, too, although the document purports to be an ancient one and has been given that appearance by exposing it to dust, dampness, acids, or other agents, chemical tests of the ink may make it clear beyond all question that in fact the document was recently written despite the ancient appearance. Because the ink is partly absorbed in the paper, is evaporated in part, and gradually hardens, as it grows older it more and more strongly resists certain acids, and the chemist is able to determine with approximate certainty whether the document is comparatively new or the ancient document that it appears to be on its face. So, too, after the chemist has subjected the document to acids, the microscope will come into play, and its magnifying power may disclose peculiarities found or not found in genuine signatures. The microscope may show, after ink has been subjected to acid tests, that the document is in truth an old one, or it may corroborate the chemical test and show it is not an old one. The literature that will help the practitioner solve the problems is not yet abundant, but in such works as Osborn on Questioned Documents the lawyer finds help when he has questions of this character to solve.

For a long time the law refused to receive in evidence genuine documents of the person in question, that they might be compared with the questioned document to determine whether or not it was

genuine. The result was that the trial lawyer was compelled to find some pretext or other that would sustain him in offering in evidence one or more letters or documents having little, if any, bearing on the real merits of the case, for the purpose of afterwards enabling his expert to compare those documents in the genuine handwriting of the person with the document or signature of the person in question. Ultimately England changed this rule by statute. New York and most if not all of the other states of this country did the same. In substance, the statutory change permitted either party to offer in evidence genuine documents or signatures of the person in question for the very purpose of enabling experts or the court or jury to compare such genuine documents or signatures with those in dispute. These statutory changes are more than a quarter of a century old in most of our states, and the statute is hardly looked at in preparing for trial, so settled has become the practice in cases of this character. Indeed, the profession of the present day has almost forgotten, if it ever knew, that the old rule existed. A striking illustration of this fact was recently disclosed.

A Miss DeWitt of Easton, Pa., was placed on trial before Judge Macpherson in the federal court, charged with sending scurrilous letters to a clergyman. She pleaded not guilty. The United States attorney was backed up by able experts who were prepared to testify that the scurrilous letters were in the handwriting of the accused. In due time genuine letters of the accused were offered in evidence to enable the experts to compare them with the letters in question. The genuine letters were objected to on the ground that the criminal law of evidence of the United States, which existed when the Constitution was adopted in 1789, applied, and, therefore, that such evidence was not admissible. The court thus decided the case:

"You have made an excellent argument, Mr. Swartley, but I am compelled to rule the document out. In criminal cases the United States courts are working under the laws passed more than a century ago, the origin of which dates so far back that the reason for them must have long since disappeared. Personally I believe that the evidence should be admitted; under the state law it would be. I have no sympathy with the ruling, but I am bound by it until Congress sees fit to make a change."

The result was that Miss DeWitt was acquitted.¹ Had that case been a civil case the result would have been different, because a test of competency would have been the test applied in civil cases at the same place; for such is the federal statute of evidence as amended June 29, 1906.²

The importance of permitting genuine handwriting to be introduced for the purpose of comparison by expert or court or jury can hardly be overestimated. For instance, the Rice will case, involving millions of dollars in property and the question of whether or not Patrick had committed forgery and murder, was practically determined on the result of the comparison of Rice's genuine signatures with his disputed signatures to the will. Patrick, his lawyer, had abundant opportunities to obtain specimens of his genuine signature and cause his signature to his will to be traced from a good specimen of the genuine signature of Rice. Rice was an old man, somewhat illiterate, and his signatures frequently differed not a little from each other; in fact his signature was seldom twice alike. To make assurance doubly sure, Rice's name was signed at the bottom of each page of his will. When the experts came to compare these signatures to the different pages of the will they found that they measured the same, looked the same and were the same to all intents and purposes. They compared them with genuine signatures in their possession and found that all four of them resembled each other more than any one of the eighty-odd genuine signatures resembled any other one. The experts could find no two genuine signatures of Rice that came anywhere near fitting each other, whereas the whole four signatures to the different pages of the will fitted each other perfectly. Not once in millions of times would such a result occur. The court therefore said:

"The name of William M. Rice appears four times upon the alleged will of 1900, and upon critical examination of these four signatures it will be found that they correspond almost exactly, a coincidence which could not possibly happen in the case of four genuine signatures of a person upwards of eighty years of age; and for this reason it does not need the testimony of experts to demonstrate that these signatures were not genuine but tracings."³

¹ 2 Journal of Criminal Law, etc., 909, 910; 2 Rose, Code of Federal Procedure, § 1760.

² 2 Rose, Code of Federal Procedure, § 1735.

³ Matter of Rice, 81 N. Y. App. Div. 223-229, 81 N. Y. Supp. 68-72, aff'd in 176,

Under the statutes permitting comparison many differing decisions in matters of detail have been made.⁴

In England, where our law of evidence came into being, and where documents were usually kept by the party or his solicitor, visible alterations were looked upon with great suspicion and were fatal to the reception of the document in evidence. So strict was this rule that an immaterial alteration by a stranger was fatal to the document as evidence. In course of time, however, the injustice worked by so strict a rule, and the lack of sound reason to sustain it, became fatal to it. The result was that the law as laid down in Pigot's case⁵ was modified and finally overruled. Little by little it came to be settled that an immaterial alteration was not sufficient to shut out the document, and ultimately it was also established that a material alteration by a stranger would not affect the document as evidence.⁶

This doctrine becomes important. For instance: Town bonds were issued to aid the building of a railroad to a town, the law of New York then permitting this to be done, and the constitutional amendment prohibiting anything of the kind not having been then adopted. The statute under which such bonds were then issued contemplated sealed instruments, and the bonds issued contained words in the attestation clause showing that the commissioners had "set their hands and seals" thereto. The commissioners signed these bonds opposite scrolls marked "L. S.", but at that time there was not a statute in New York, as there is now, making the "L. S." the equivalent of a seal. The commissioners omitted to put any seals on the bonds, and they were delivered to the railroad company, pursuant to the proceeding, in this condition, without seals upon them. Afterwards, the railroad company sold these bonds to *bonâ fide* holders for value, in good faith, such purchasers finding seals upon the bonds when they were delivered to them, and being ignorant of the fact that seals were not on the bonds when they were delivered to the rail-

N. Y. 570-571, 68 N. E. 1123 (1903); Osborn, Questioned Documents, 111, 274, 298, 299, 300.

⁴ Jones, Evidence, 2 ed., §§ 551-552.

⁵ 11 Coke 26 b.

⁶ 3 Phillips, Evidence, Cowan, Hill & Edward's Notes, 389, and cases cited.

road company. In a suit in equity to cancel the bonds for various other reasons, it was also claimed that they should be canceled because of the material alteration in them which was thus brought to the very doors of the railroad company itself, by the undisputed facts. A very able court held that the form of the statute and the form of the bonds did not carry any authority to the railroad company to affix seals to the bonds; also that treating the addition of the seals as a material alteration, that material alteration, even if it was assumed that it was made by the railroad company as an interested party, would not justify a court of equity in canceling the bonds in the hands of innocent holders, when there was no proof that the seals were added for a fraudulent purpose. The court of equity, therefore, refused to cancel the bonds in the hands of *bonâ fide* holders for value, on the theory that it would not be equitable to cancel them under the circumstances.⁷

The court of equity having refused to cancel the bonds, as stated, an action was brought to recover the unpaid interest coupons attached to the bonds. The judgment in the equity action which had determined that the bonds were valid bonds, was put in evidence to sustain the claims of the holders of the coupons, and as being *res judicata* on the town that the bonds were valid, and, therefore, sufficient evidence upon which to warrant judgment against the town for the interest on the bonds. The town insisted, among other things, that the equity judgment was not conclusive, especially on the issue of alteration. The court discussed that issue on its merits, as well as on the basis of *res judicata*. As to the merits, it held, in substance, that the court of equity had the power to disregard the alteration, in the absence of any words in the statute making the bonds void if seals were not attached, and that in doing so the court of equity in effect corrected the mistake or misunderstanding in not attaching seals to the bonds, and they thus became valid bonds. At all events, the court was of the opinion that the issue was no longer open, after the question had been passed upon by a court of equity.⁸

The result in the equity suit reminds one of the suit in equity in Vermont that came before a lay judge of that state at an

⁷ Town of Solon v. Williamsburgh Savings Bank, 114 N. Y. 122, 21 N. E. 168 (1889).

⁸ Williamsburgh Savings Bank v. Town of Solon, 136 N. Y. 465, 32 N. E. 1058 (1893).

early day, when such judges could sit in such cases, the issue being the validity of an unsealed deed, and the lay judge, being informed on the argument that equity regarded that as done which should have been done, said to the counsel who claimed that the deed was void: "If a seal had been put on this deed, it would have been good?" He said "Yes." "A seal should have been put on this deed?" He said "Yes." "Well," said the judge, "a court of equity sits for the purpose of compelling parties to perform their contracts, and instead of directing your client to put a seal on this deed, I will put one on myself," and suiting the action to the word he did so, and handed it to the dumfounded counsel, with the remark: "Now that is a good deed." This summary procedure was too much for the counsel, as I am informed by the Vermont lawyer who told me the story, and he had no courage to take an appeal.

The importance of this principle may be illustrated in another case. An important mortgage is made. It is upon the property of a woman whose husband looks after the details of the matter for her although without specific authority to represent her as her agent. After the mortgage was made and executed by the woman, by direction of the husband in the absence of his wife, the attorney who prepared it inserted a further provision making it security for other notes and drafts. Of this alteration by the insertion of the additional provision the woman knew nothing until a foreclosure of the mortgage was commenced. Thereupon she pleaded the alteration in the mortgage as a defense. Upon the trial the facts appeared without dispute, and the court therefore held that the husband not being the agent authorized to make the alteration, the alteration by the attorney at his instance was an alteration by a stranger. The court therefore rejected the provision inserted after execution, and enforced the mortgage as if that provision had never been inserted.⁹

In the case last cited, however, in the absence of suspicious circumstances calling for explanation or evidence to show that the rejected clause was inserted after execution, the presumption of law would have been that the clause was inserted before or at the time of execution and, therefore, the mortgage would have

⁹ *Gleason v. Hamilton*, 138 N. Y. 353, 34 N. E. 283 (1893), and English and American cases there cited.

been enforced as if the rejected clause had been inserted before execution.¹⁰

As to wills, the law is thus stated by Stephen:¹¹

“Alterations and interlineations appearing on the face of a will are in the absence of all evidence relating to them presumed to have been made after the execution of the will.”

I have observed no American edition of Stephen's accurate work taking issue with this statement of the law, although I cannot lay claim to having examined all American editions. In the notes of some of the American editors to Mr. Stephen it distinctly appears that some of the American cases are in harmony with the English cases which sustain the proposition thus laid down by Mr. Stephen. Moreover, an examination of American works on evidence will show that a large number of American authors accept the law as laid down by Stephen as the law of this country. After a careful examination of many cases I am satisfied that in a large number of our states the law of this country is different from the law of England as to alterations in wills. The English Wills Act and the American statute found in most states are not the same in substance. The English rule, too, developed under different circumstances and conditions from those prevailing in this country. The statute in this country that usually prevails makes it logical for our courts to presume that apparent alterations in wills in the absence of suspicious circumstances were made before execution. In England, on the other hand, the statute at least suggests that an alteration should be deemed to have been made after execution in the absence of evidence to the contrary. The English statute¹² provides:

“No obliteration, interlineation or other alteration made in any will after the execution thereof shall be valid . . . unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will with such alteration as part thereof shall be deemed to be duly executed if the signature of the testator and the

¹⁰ Stephen, *Digest of Evidence*, Art. 89, and cases cited by editors of American editions; *Little v. Herndon*, 10 Wall. (U. S.) 26 (1869).

¹¹ Art. 89.

¹² 1 Vict. c. 26, § 21.

subscription of the witnesses be made in the margin or on some other part of the will opposite or near to said alteration or at the foot or end of or opposite to a memorandum referring to such alteration and written at the end or some other part of the will."

Having this statute in mind, it seems reasonably clear that where an alteration appears in an English will, compliance with this statute requires that the alteration be verified by the signature of the testator and the witnesses in the margin or on some other part of the will or at the foot of it as required by the statute. Otherwise the court will necessarily reject it on the theory that it is presumed to have been made afterwards, because it is not authenticated as having been made before or at the time of execution as required by the statute.

The American statute, however, the law in force in New York and most states, requires the following things in the execution of the will:

1. That it be "subscribed by the testator at the end of the will";
2. That this be done by the "testator in the presence of each of the attesting witnesses or . . . acknowledged by him to have been so made to each of the attesting witnesses";
3. The testator at the time of signing or acknowledging it "shall declare the instrument so subscribed to be his last will and testament";
4. "There shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will at the request of the testator."¹³

In Massachusetts and perhaps some other states three attesting witnesses are required instead of two, but so far as I have observed the statutes are substantially the same in most if not all of our states.

It will be observed that in this American statute not a word is said about alterations or how they shall be evidenced. It is true that in practice alterations made before execution or at the time of execution, if made under the advice of an experienced lawyer, are usually witnessed on the margin by the initials at least of the testator, or else such alterations are enumerated in the attestation clause after the signature of the testator but before the signatures of the attesting witnesses. Suppose, however, the will is all in the

¹³ 1 N. Y. Consol. Laws, Decedent Estate Law, 500-501, § 21.

handwriting of the testator, and it discloses alterations but discloses nothing as to when the alterations were made. Is there any reason in the American statute, or in the law of evidence, for determining, in the absence of other evidence, that the alterations were not made before the will was subscribed by the testator and witnessed by the attesting witnesses? I can find none.

Assume, however, that the will is all in the handwriting of the testator, but that alterations appear in it in a different ink in his own handwriting. May we not then conclude that the alterations were made after the will was originally written? Must we not conclude that as the alterations are in different ink they must have been made after the will was written by the testator? If scanning the will closer we find no ink employed by either the testator or the attesting witnesses such as the ink in which the alterations appear, are we not forced to the conclusion that the different ink was used by the testator at a different and later time than the time of execution?

Substantially the case last supposed came before Surrogate Rollins, a very experienced and able lawyer and judge, in 1882. His opinion shows that from the will itself he was satisfied that the alterations were made by the testator after the execution because a different ink was employed from that in which the will was written, signed, and witnessed, and as the testator had the will in his own possession the conclusion was irresistible that he made the subsequent alterations in a different ink subsequent to the execution. The alteration was important, as it cut down a legacy from five thousand dollars to two thousand dollars. The surrogate, however, not only called attention to these facts as a reason for his decision, but he examined the English statute of wills and the English decisions, and rested his conclusion as well upon the proposition that it was a presumption of law that the alteration was made after the execution of the will. In so doing he did not observe the difference between the English and American statutes, but instead seemed to think they were substantially the same so far as the question involved was concerned.¹⁴

A little later the Court of Appeals had a somewhat similar case before it.¹⁵ There duplicate wills were executed at the same time,

¹⁴ *Wetmore v. Carryl*, 5 Redf. Sur. (N. Y.) 544 (1882).

¹⁵ *Crossman v. Crossman*, 95 N. Y. 145 (1884).

and an interlineation was noted at the bottom of one before the attestation clause with the statement that it was made before signing. The court said:

"Here from all the circumstances it was at least for the Surrogate to determine whether this interlineation was made before or after execution; and in making that determination he was bound to consider the handwriting, color of the ink, manner of the interlineation, the fact that it was noted at the bottom of the instrument and that it was made to correspond with the other duplicate. Where an interlineation or erasure is fair upon its face and is entirely unquestioned, there being no circumstance whatever to cast suspicion upon it, it would not be proper for any court to hold that the alteration was made after execution; but if there are any suspicious or doubtful circumstances growing out of the mode of the alteration, the ink in which it was made, the fact that it was in favor of the party holding the instrument and that it is not noted at the bottom, then these and all the other circumstances must be submitted as questions of fact to be determined by the court in deciding whether the alterations were made before execution or not."

The case last cited is a leading case and is followed in New York.

In the second edition of his work on evidence, Mr. Jones discussing this very subject after quoting Stephen on Evidence, says:

"As will be seen when the different views are stated, it would be vain to attempt to reconcile the decisions on this subject in the United States. It will be found, however, that the distinction which exists in England with respect to deeds and other instruments is not generally made in this country. The mere fact that there is an interlineation would not seem to call for any explanation provided the appearance of the writing and ink is such as to indicate that the whole was written at the same time and by the same person."¹⁶

The opinions of other text writers are collated below.¹⁷

¹⁶ Jones, Evidence, 2 ed., § 563, and cases cited.

¹⁷ The difference between the English and American statutes underlying the decisions seems to have been generally overlooked and many authors dodge the question. Others are more helpful. For instance, Best gives the English rule that interlineations will be presumed to be at the time of making the deed; but an erasure or alteration in a suspicious place must be explained, and in the case of wills, the presumption is the other way, attributing the exception to the Wills Act. Best, Evidence, 10 ed., § 229. This appears also to be the law of Canada. *Id.*, Canadian Notes, p. 448. Taylor gives as the English rule that an alteration in a deed is presumed to have been cotemporaneous with execution, in a will after execution, and with respect to a bill of exchange or promissory note, the law presumes nothing. Taylor, Evidence, 10 ed., § 1819. Elliott says of the American decisions: "There

In cases where the will is prepared by an experienced lawyer such care will be taken about the interlineation that the attestation clause will account fully for any alterations, erasures, or changes of importance. If such changes are important and there is time to do so, the will, or the part of it that requires change, is usually rewritten or re-typewritten to eliminate all alterations and erasures, and, consequently, we find few cases presenting these questions where wills have been prepared by experienced lawyers.

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is almost hopeless conflict among the decisions in this country as to the burden of proof and presumption, if any, where the alteration is apparent upon the face of the instrument." He classifies the cases into four groups, holding: (1) that no presumption arises and the question when the alteration was made is for the jury in the light of all the evidence, intrinsic and extrinsic; (2) that the presumption is that the alteration was made after execution and delivery; (3) that the presumption that the alteration was made after execution and delivery arises only where the alteration or facts surrounding it are suspicious; (4) that the alteration is, without explanation, presumed to have been made before delivery. 2 Elliott, Evidence, § 1504. This author says there is, perhaps, more reason for presuming that an alteration in a will was made after execution, and lays down the general rule that an alteration of a will found in the custody of the testator is presumed to have been made after execution, by the testator; but, if found in the custody of one interested in suppressing it, the alteration will not be presumed to have been made by the testator. 3 *id.*, § 2700. Wigmore states that the modern tendency is to avoid stating the problem in the form of rules and exceptions, and to abandon the presumption that an alteration of a deed was made before execution, and to raise no genuine presumption in that regard. Wigmore, Evidence, § 2525.

A WORD ABOUT COMMISSIONS.

WE have entered into an age which is wholly out of sympathy with the old *laissez faire* doctrine. It is apparent that everywhere and on every hand the state is beginning to deny that a man may do as he pleases with what he may call his own. The business man no longer may manufacture his drugs or his paints or his food products as he may desire. The state has stepped in and told him that there are certain things that he must do, and that there are other things that he must not do. The public service corporations everywhere have either felt, or are beginning to feel, the iron hand of a strong government; and though for years they attempted to resist and to struggle from under the control that the government was endeavoring to assert, they are now gradually, though begrudgingly, beginning to yield to public pressure. Every day our government is apparently adding to its own functions or developing, to an extent unthought of a half-century ago, its old ones. Each day our government is becoming more comprehensive and more complicated because the state is enacting new laws regulating our industrial and our social welfare.

A representative in one of our state legislatures may have had some poor success in the quality of paint he has used on his farm barn. He believes that the paint was adulterated, and that his constituents as well as the entire population of his commonwealth have been continuously and steadily duped and defrauded by what he emphatically calls the paint trust; so he promptly, and possibly hastily, prepares a bill for the creation of a paint commission, whose duty it is to pass upon the question of what constitutes pure paint (though the purest of paints may contain poisonous ingredients), the manner of the sale of the pure article and the condemnation and destruction of the impure one, and the methods of enforcing the law itself. If one of our legislators does not like the way in which our large public utility corporations may be running matters, the schedules that may have been prepared by the railroads for intrastate business, the quality of gas that he may be getting or the price that the gas company may be charging for it, a bill is presented in the state legislature and a new law is enacted for the

creation of a public service commission. We have factory commissions and labor commissions; we have commissions to hire and discharge our city employees. We have commissions and boards of health to pass upon the food that may be set before us and the drugs that we all try to keep away from; commissions to regulate municipal dance halls, bathing beaches and parks, and child labor. On every hand, just as we have numerous commissions to regulate our industrial welfare, so, too, we have commissions to pass upon our social welfare.

The commission which has had given to it the right to regulate an entire industry has a far-reaching power. The commission that controls and regulates the management of all the public utilities of a state has in its hands the regulation of business and the limiting of profits on business, involving untold millions. So, too, the happiness and well-being of thousands may be deeply affected by commissions looking after our social welfare.

In every walk of life man is tending to specialize. The lawyers have divided and subdivided their profession into small parts, and many are satisfied to take one of these parts and to master it. We are inclined to sneer at the general medical practitioner, for we feel that the whole field of medicine is too big for one man to comprehend. For the purpose of specialization, the medical practitioner has not only divided the body into its separate organs, but even the sexes have been divided, and now man is being classified according to his age.

If in law and in medicine and in science there are specialists, why should there not be specialists in government? Is government such a simple matter that one man may comprehend it all? Can one person or group of people have such a universal knowledge of society and industry at large, in all its intricacies and perplexities, as to be able to give us the most efficient government? We know better than this. For a long time we have believed that a few men who have devoted their entire time to a few duties will learn to understand those duties and to perform them better than if their time and energy were dissipated in the execution of many duties. The public sees that a legislative body that comes into existence in a more or less haphazard manner, in the very nature of things has too many matters coming before it to regulate with any satisfaction, in detail, even one of our industries. Public opinion has

made our legislatures realize this fact, and to-day they are glad to delegate in a large measure some of their former functions to various commissions who may have specialized in a limited field. A commission that specializes may act, and often does act, as a watchdog to see at all times that its rules and regulations are carried out. The commission has the time to go into details of fact and to draw a conclusion that may bear weight. The commission has been found to be a satisfactory expedient. There are so many commissions touching our social and industrial welfare at so many points, that it may be worth our while to examine into their position from a legal point of view.

At the outset, the question arises as to the nature of the duties of a commission. If a commission is an administrative body or a legislative body, then the course of procedure before it is likely to take an entirely different form from that it would take were it a judicial body. An administrative or a legislative body is not likely to follow the technical rules of evidence. Lawyers themselves, who have more or less to do with molding the forms of procedure, are in the one case less likely to press upon the commission that it should follow the intricate procedure of the law of evidence than in the other.

Are the acts and the doings of the ordinary commission legislative, executive, or judicial? In an interesting case before the Supreme Court of the United States,¹ the court went quite extensively into the question whether the duties of the State Corporation Commission of Virginia were judicial or legislative. The constitution creating the commission provided that it should have the power and be charged with the duty of supervising, regulating, and controlling all transportation and transmission companies doing business in the state, in all matters relating to their performance of their public duties and their charges therefor, and of correcting abuse thereof — to enforce such rates, charges, rules, and regulations, and require the companies to maintain such service facilities and conveniences as might be reasonable, and to prevent unjust discrimination. The act further provided that the commission should have the power to administer oaths, compel attendance of witnesses, and to punish for contempt. There were further pro-

¹ *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 29 Sup. Ct. 67 (1908).

visions in the act giving it certain powers to enforce its findings. There the court, in its opinion by Mr. Justice Holmes, said:

"But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place with a body which, at another moment, or in its principal or dominant aspect, is a court such as is meant by Section 720. A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial in kind, as seems to be fully recognized by the supreme court of appeals (*Com. v. Atlantic Coast Line R. Co.*, 106 Va. 61, 64, 7 L. R. A. N. S. 1086, 117 Am. St. Rep. 983, 55 S. E. 572), and especially by its learned president in his pointed remarks in *Winchester & S. R. Co. v. Com.*, 106 Va. 264, 281, 55 S. E. 692."

The court cited other authorities in support of this proposition.

Chief Justice Fuller, while agreeing with the conclusion of the court, dissented from the opinion. He was of the belief that the act was a judicial one, not legislative. In the course of his opinion he said:

"The Virginia State Corporation Commission was created and its functions, powers, duties, and the essentials of its procedure were prescribed in detail by the Constitution of the State as well as by statute. It was made primarily a judicial court of record of limited jurisdiction, possessing also certain special legislative and executive powers. When it proposed to make a change in a rate of a public service corporation, or otherwise to prescribe a new regulation therefor, the commission was required, sitting as a court, to issue its process, in the nature of a rule, against the corporation concerned, requiring it to appear before the commission at a certain time and place and show cause, if any it could, why the proposed rate should not be prescribed. The judicial question involved on the return to such rule was whether or not the contemplated rate was confiscatory, or otherwise unjust or unreasonable, and in the hearing and disposition of this question the proceedings of the commission, as prescribed by law, were in every respect, the same as those of any other judicial court of record. It issued, executed, and enforced its own writs and processes; it could issue and enforce writs of *mandamus* and injunction; it punished for contempt; and kept a complete record

and docket of its proceedings; it summoned witnesses and compelled their attendance and the production of documents; it ruled upon the admissibility of evidence; it certified any exception to its rulings; and its judgments, decrees, and orders had the same force and effect as those of any other court of record in the state, and were enforced by its own proper processes. It was not subject to restraint by any other state court, and from any and every ruling or decision by it an appeal lay to the supreme court of appeals of the state, and was heard upon the record made for and certified by the commission, exactly as in the case of appeals from any other court; and, pending the decision of such appeal, the order appealed from might, by *supersedeas*, be suspended in its operation."

Mr. Justice Harlan was also of the opinion that the act of the Virginia State Corporation Commission was in every sense judicial.²

A similar question arose as to the nature of the acts of the Public Service Commission in the State of New York.³ There the court, after reviewing the *Prentis* case, expressly held the acts of such a commission judicial and not legislative. The court expressly denied that the acts of the commission were necessarily non-judicial because it enforced or attempted to enforce a rule of conduct for the future. It pointed out that a judicial decision often determines in advance what future action will be a discharge of all existing liabilities or obligations. Thus, it pointed out that in the specific enforcement of contracts which are to extend over a long period of time the court may dictate the details of performance. The court also indicated that in actions for divorce or separation it is the constant practice of the courts to prescribe for the custody and care of children and to provide for the subsequent modification of such provisions from time to time as circumstances may necessitate.

On the other hand, there have been a vast number of the most eminent authorities that have held that the functions of a commission are purely administrative. In giving its opinion to the Massachusetts House of Representatives as to the constitutionality of the Civil Service Law of that state⁴ the Supreme Judicial Court of Massachusetts said:⁵

² See also *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S. 479, 17 Sup. Ct. 896 (1896).

³ *People ex rel. Railroad v. Willcox*, 194 N. Y. 383, 87 N. E. 517 (1909).

⁴ Laws of 1884, c. 320.

⁵ Opinion of the Justices, 138 Mass. 601 (1885).

"The object of the statute before us is to provide for a board of commissioners, who shall make rules for the selection of persons to fill such offices in the government of the Commonwealth, and of the several cities thereof, and supervise the administration of such rules. We think the Legislature has the constitutional right to provide for the appointment of such commissioners, and to delegate to them the power to make rules, not inconsistent with existing laws, to guide and control their discretion and the discretion of the officers of the State or of the cities in whom the appointing power is vested. This is not a delegation of the power to enact laws; it is merely a delegation of administrative powers and duties, and there is no provision of the Constitution which prevents the Legislature from enacting that such rules, when duly made, shall be binding upon the officers and citizens to whom they apply, and that they may be enforced by suitable penalties, as provided in the last section of the statute."

The United States Supreme Court apparently agreed with this view of the law in the case of *Stone v. Farmers' Loan & Trust Company*.⁶

In the case of the *City of Aurora v. Schoeberlein* ⁷ the Supreme Court of the State of Illinois passed upon a clause of the Civil Service Act of 1903 which permitted an appeal to the circuit court from any decision of the commission discharging an employee, and which permitted the circuit court to set aside the findings of the commission. The court held that this section of the act was unconstitutional for the reason that the government of the state of Illinois was divided by the constitution into three separate functions,—legislative, executive, and judicial; that the removal of an officer in a civil service proceeding was an executive act, and that the allowance of an appeal to the circuit court for the purpose of reviewing an executive act was vesting the circuit court with executive powers, which was contrary to the constitution of the state.⁸

And the United States Supreme Court, in a line of cases where the acts performed were of a similar nature, has held them to be administrative. Thus the United States Supreme Court, in a decision rendered by Mr. Justice Brewer, in the case of *Burfenning v. The Chicago, St. Paul, etc. Ry. Co.*,⁹ strongly intimates that

⁶ 116 U. S. 307, 336, 6 Sup. Ct. 334, 338, 1191 (1886).

⁷ 230 Ill. 496, 82 N. E. 860 (1907).

⁸ See also *Wyman, Public Service Corporations*, § 1404, p. 1235.

⁹ 163 U. S. 321, 16 Sup. Ct. 1018 (1896).

the Land Department in passing upon the question whether a certain tract of land was swamp land or not, saline land or not, mineral land or not, was passing upon an administrative question. In the case of *American School of Magnetic Healing v. McAnnulty*,¹⁰ the United States Supreme Court held that the Post Office Department, in passing upon the question of whether certain printed matter should be excluded from the mails on the ground that it was fraudulent, was performing a purely administrative act. So, too, the United States Supreme Court, in a number of cases involving the rights and powers of an immigration inspector, has invariably been inclined to hold that his duties were administrative. The most important case upon this subject probably is *United States v. Ju Toy*.¹¹ In that particular case the petitioner filed a petition for a writ of *habeas corpus*, and alleged that he was about to be wrongfully deported on the ground that he was an alien, born in China, while in fact he was a native-born citizen of the United States. It appeared, however, that the immigration inspector had taken evidence and decided that the petitioner had not been born in the United States, and had denied him admission to the United States and ordered him deported. It would be hard to support this case on any theory other than that the act of the immigration inspector was an administrative one, and all the more so for the reason that the court held that if the inspector had not abused his authority the act of the department must be absolutely final and conclusive, and that even though the question of citizenship might be raised, the court had no power to review such finding.

The question of what may constitute a just and reasonable rate is necessarily a question of fact to be determined from a mass of intricate facts. The question of what may or may not be a pure food, or what may constitute a pure drug, or what may or may not be an adulterated paint, is likewise a conclusion of fact to be drawn from a group of facts somewhat less complicated. Whether a civil service employee has disobeyed the rules established by a civil service commission or the head of a department, or is so inefficient in his work that he should be discharged, necessarily is a similar conclusion. This must likewise be true of the duties of an immigration inspector when he passes upon the question of a man

¹⁰ 187 U. S. 94, 108, 23 Sup. Ct. 33 (1902).

¹¹ 198 U. S. 253, 25 Sup. Ct. 644 (1905).

seeking admission to this country as an alien or as a citizen. It would seem to follow that the duties of all these bodies are one and the same, and that if some are administrative in their nature, others likewise must be administrative. These commissions are doing the duties of highly specialized juries. They are passing upon and resolving very important questions of fact. Of course if a commission is to have any authority whatsoever, it must have the right to compel the attendance of witnesses, and the power to punish witnesses or to cause their punishment in the event of their refusal to attend. It must be taken for granted that if the acts of a commission are to have any weight, it must have some power to enforce its findings. Consequently, the reasons that some of the judges of the United States Supreme Court gave in the *Prentis* case why the Virginia State Corporation Commission is a judicial body do not seem to be conclusive.

It should be noted that commissions only in a limited sense pass upon property rights. They do not decide that a certain property belongs to A. or to B. They do say that certain property that belongs to A. can be used by him only in a certain way. They tell public service corporations how they must run their trains, or what rates they may charge in the sale of their gas or electricity, or whether they may establish new rates or not. They tell those who manufacture drugs or food products that they can sell them only if they do not contain certain ingredients. The right to hold an office may or may not be regarded as a property right, but even in those states where it is regarded as one, nevertheless, all that a civil service commission does is to see to it that the man who holds his office complies with the rules, and both does the things that are required of him and abstains from doing those acts that are forbidden. In other words, a commission merely passes upon the method that a man must adopt in using what belongs to him.

Every legislative body has the power to enforce obedience to its *subpœna* and to compel witnesses to testify before it. The land commission, the immigration inspectors, and the civil service commission, have a like power. Would it not be better to say that legislative, administrative, and judicial bodies, if given the authority by the legislature, may compel witnesses to come before them and to attend, than to hold that because such a body has that power it is therefore a judicial body?

Nor does it seem clear that the majority of the court in the Prentis case was correct in holding the commission a legislative body. The real test that the court applied was that the commission had authority to make rules and regulations. It is almost fair to say that every civil service commission in the United States has this same power. Nevertheless, it is apparent that the civil service commission in its nature is administrative. It must be conceded that civil service commissions have merely taken over certain powers that were formerly given to the administrative head of the government. The mayor of a city or the governor of a state where there is a civil service act has been shorn of his power, for the most part, to appoint employees or to remove them. This was a power he had in the past. Certainly in the past, when the head of the government exercised this power, it was not a legislative function. The legislature has taken this function from him and placed it in the hands of an impartial body. It has transferred from one head to another certain administrative powers. In creating civil service commissions the legislature transfers the employment bureau of the government to a new body. Formerly the mayor or governor may have made certain rules on which he based the appointment, advancement, and removal of employees. This is exactly what the civil service commission does after it is once constituted. But in the nature of things does it follow from the mere fact that the law gives it the express right to make such rules, that therefore the legislature made it a legislative body?

A court is given the right to make its rules, to guide it and to aid it in the management of the business that comes before it. These rules very often are of the greatest importance, but no one has ever been inclined to hold that because a court may make rules and regulations governing either it or litigants, it is therefore a legislative body. It therefore does not seem a fair test to hold that because a body may make rules and regulations, it is a legislative body.

If a commission is regarded as an administrative or a legislative body on the one hand or a judicial body on the other, not only may we expect to see a different development in the method of its procedure and in the rules of evidence that will prevail and in the method of reviewing the findings of its decisions, but we are also likely to see a substantial difference in the nature of the men who may be

appointed to constitute such commissions. If it is a judicial body, then it seems to be highly important that its members may be those who are versed in law, in order that they may correctly interpret the law of the land. If it is a judicial body, then questions of law are more likely to be emphasized. If, however, the commission is regarded as an administrative body, then the legal features will be minimized; then it will not be necessary that those who may be its members be versed in the substantive and adjective law of the land. The law will not be emphasized. Men then will be more likely to be appointed to its membership who have specialized in that particular part of our industrial and social life that the commission is called upon to regulate; and it is highly important that this should be so. There is no reason why a lawyer should be of any particular aid in determining what may be a fair and remunerative rate for a public service corporation. There is every reason, however, why a man who has given a life study to gas, electric and power plants, and to railroads may be of the greatest assistance in establishing a fair rate. If our commissions are to be of value, it is to be hoped that those who are appointed to them will be experts, and that in reaching their conclusions they will not be hindered by the vexatious delays of legal technicalities.

An administrative body will probably listen to hearsay evidence and give it such weight as it considers it worth. It may dispense with the technical proof of the execution of documents or of signatures; it may hear witnesses of either side in such order and at such times as it may see fit. On the other hand, a judicial body is quite likely to find itself bound by the rules of evidence, and to have its decisions and findings reversed if it allows improper evidence or refuses to permit proper evidence as determined by the forms and standards of law. If the commission is regarded as an administrative body, the conclusion of the commission on the question of fact should not be subject to review by a court unless such conclusion in some way violates a law of the land. It should not be subject to attack because in the eyes of the court it may or may not have been sustained by the weight of the evidence presented. In the event, however, that the commission is a judicial body, the conclusion is more likely to be set aside because it was not sustained by the preponderance of evidence that may have been introduced. So, too, if the functions of a commission are regarded as judicial on

the one hand or executive on the other, there is likely to be a great difference in the law of appealing from or reviewing the findings and decisions of the commission. The law seems to have been fairly and definitely settled as to the powers of the court to review and set aside the findings of the commission where it has been held to be an administrative body. It is not clear, however, what the powers of a higher court may be in reviewing or setting aside the findings of a commission where it is regarded as a judicial or legislative body.

In the case of *Burfenning v. Chicago, St. Paul, etc. Ry.*,¹² the Supreme Court held that the findings of the land commission were final and could not be reviewed. The court said in that opinion that it had been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the land department, and that its judgment thereon is final.¹³ This has been affirmed by a long series of cases.¹⁴

So, too, in the immigration cases, where the immigration inspector passes upon one of the most important of all possible questions from a governmental point of view — that of citizenship — it has been held that his finding is not subject to review. In the case of *United States v. Ju Toy*,¹⁵ the immigration inspector had held that the petitioner was an alien, born in China, and that he was admitted to come into the United States in violation of the immigration act, and therefore had ordered him to be deported. The court, in a decision rendered by Mr. Justice Holmes, there held that the decision of the department was final, whatever the grounds on which the right to enter the country was claimed. And the court was apparently of the opinion that the decision of the Secretary of Commerce and Labor in the matter was conclusive and not subject to review.¹⁶

¹² 163 U. S. 321, 16 Sup. Ct. 1018 (1896).

¹³ See *Bates & Guild Co. v. Payne*, 194 U. S. 106, 24 Sup. Ct. 595 (1904); *Heath v. Wallace*, 138 U. S. 573, 11 Sup. Ct. 380 (1891).

¹⁴ See *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 23 Sup. Ct. 35 (1902); *Public Clearance House v. Coyne*, 194 U. S. 497, 508, 24 Sup. Ct. 789 (1904).

¹⁵ 198 U. S. 253, 25 Sup. Ct. 644 (1905).

¹⁶ See also *Edsell v. Mark*, 179 Fed. 292 (1910); *Lem Moon Sing v. United States*, 158 U. S. 538, top p. 544, 15 Sup. Ct. 967 (1895); *United States v. Sing Tuck*, 194 U. S. 161, 24 Sup. Ct. 621 (1903); *Yamataya v. Fisher*, 189 U. S. 86, 23 Sup. Ct. 611 (1903).

In the State of Illinois this point has been established by innumerable decisions. Thus in the case of *People ex rel. Hayes v. City of Chicago*¹⁷ the court said:

"It makes no difference whether the review is attempted by *certiorari* or in a petition for *mandamus*; the inquiry on our part and on the part of the Circuit and Superior Courts is limited to the questions whether the Commission had jurisdiction and whether it followed the form of procedure legally applicable in such cases. This is what the Supreme Court said in *People v. Lindblom*, 182 Ill. 241, and we have repeated in the Heaney case and in other cases.

"With the justice or injustice of the Commission's findings and sentence the courts have nothing to do, nor with the severity of the punishment, provided always that the findings and action are within its jurisdiction and the proceedings regular."

And numerous authorities have held that an administrative commission is not bound by the ordinary technical rules of evidence or procedure.¹⁸

To make the working of our commissions efficient and expeditious in order that they may give satisfaction to the community as a whole, and be a benefit to our times, they must be relieved from the technicalities and delays that have surrounded our courts. Technicality has been the mother of delay in our courts. In this great branch of our government the law is at the threshold of new interpretation. It is to be hoped that these laws will be interpreted in a broad and comprehensive manner so that the working of the commission will not be interfered with, and may result in the greatest possible benefit to us.

The death-knell of the *laissez faire* doctrine that prevailed at the end of the eighteenth century and the beginning of the nineteenth century has been sounded. The commission has been instrumental in burying it. It is developing, as a public servant, the technical man. Commissions have been created where technical knowledge

¹⁷ 142 Ill. App. 103 (1908).

¹⁸ See *Joyce v. City of Chicago*, 216 Ill. 466, 75 N. E. 184 (1905); *City of Chicago v. People ex rel. Gray*, 210 Ill. 84, 92, 71 N. E. 816 (1904); *People ex rel. Maloney v. Lindblom*, 182 Ill. 241, 244, 55 N. E. 358 (1899); *People ex rel. Weston v. McClave*, 123 N. Y. 512, 25 N. E. 1047 (1890); *Avery v. Studley, Mayor*, 74 Conn. 272, 50 Atl. 752 (1901); *State ex rel. McDonald v. Corteney*, 23 S. C. 180 (1885). An analysis will show that the United States immigration, land, and post office cases are to the same effect.

is of the greatest possible value and necessity. So long as commissions continue to give satisfaction, we must expect that the public will demand new commissions from time to time touching new branches of industry and society. And so we are rapidly coming to be governed by commissions.

Herbert J. Friedman.

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REGULATION OF MONOPOLY UNDER THE SHERMAN ANTI-TRUST ACT. — Under the sweeping terms of the Sherman law, any direct restraint of trade appeared illegal a few years ago.¹ Public service companies, especially, seemed under the ban.² But since the Standard Oil case, not only must the restraint of trade be unreasonable to be illegal, but the remedy provided must regard the public interest.³ In a recent case a terminal company owned by eight of twenty-four competing railroads was found to be an illegal monopoly by reason of its size and unfair methods. *United States v. Terminal R. Ass'n of St. Louis*, 32 Sup. Ct. 507. The terminal company, a combination of previously competing terminals, had acquired all possible terminal facilities, but the decree provided simply that arbitrary charges cease, and any railroad applying be furnished with equal service on reasonable terms, and at the railroad's option be admitted to joint ownership and control in the terminal company. Dissolution was provided for only in case this plan failed.

The test of illegality applied was that laid down in the Standard Oil and Tobacco cases,⁴ the extent of control, and the methods of obtaining and exerting that control. Since the combination was not dissolved, however, the economic advantages of size in determining reasonableness

¹ See *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 328, 17 Sup. Ct. 540, 554; *United States v. Joint-Traffic Association*, 171 U. S. 505, 571, 19 Sup. Ct. 25, 32; *Northern Securities Co. v. United States*, 193 U. S. 197, 328, 331, 24 Sup. Ct. 436, 453, 454.

² See *United States v. Joint-Traffic Association*, *supra*.

³ See *Standard Oil Co. v. United States*, 221 U. S. 1, 78, 31 Sup. Ct. 502, 523.

⁴ See *Standard Oil Co. v. United States*, 221 U. S. 1, 60, 31 Sup. Ct. 502, 516; *United States v. American Tobacco Co.*, 221 U. S. 106, 180, 31 Sup. Ct. 632, 648.

are recognized. A combination of public service companies, far from being prohibited altogether, furnishes one of the first examples of reasonable restraint of competition. The public inconvenience incident to independent terminals in crowded cities, and the waste of duplicate equipment, make a more desirable unification difficult to imagine.⁵ But it cannot yet be said that the question of monopoly is simply one of methods,⁶ and not at all of size. A combination which has never exerted unfair methods may grow to such extent that competition in that field is excluded.⁷ If the control thus obtained is maintained for no better economic reason than the power to do so, it would seem clearly objectionable.⁸ And even if economic advantage requires the combination despite the resulting stifling of competition, it may still be declared illegal, and a decree granted similar to that in the principal case.

Regulation, instead of dissolution under the Sherman Act, is the distinct step taken in the principal case. How far this policy will be carried must be merely conjectural. The remedy of regulation will probably be cautiously applied, for, unless the public interest in its maintenance is very clear, the policy against monopoly seems to require dissolution. The considerations controlling will probably be economic, rather than social. The argument for the preservation of the small business man⁹ is not of prime importance under modern business conditions, and if the combination is clearly economically desirable, it seems the public interest is protected by regulation, even as applied to businesses other than public service companies.¹⁰ By such regulation, since the control over the market is gone, the monopoly itself may be said to disappear.

Regulation such as that enforced in the principal case seems mainly an application of public service law.¹¹ The obligations of businesses affected with the public interest are to serve all,¹² at reasonable rates,¹³ with adequate facilities,¹⁴ and without discrimination.¹⁵ Only the provision for joint ownership is novel in public service law, but it seems necessary to secure equality of service. Where the public servant is controlled by a separate business which it serves, the opportunity for secret discrimination is great.¹⁶ The growing policy against public

⁵ See *Bridwell v. Gate City Terminal Co.*, 127 Ga. 520, 56 S. E. 624.

⁶ But see 12 COL. L. REV. 116.

⁷ The reasons among others may be control over the source of supply, or cost of plant. See 25 HARV. L. REV. 73; 1 WYMAN, PUBLIC SERVICE CORPORATIONS, §§ 120 *et seq.*

⁸ *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376. See 25 HARV. L. REV. 643.

⁹ See the remarks of Peckham, J., in *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 323, 17 Sup. Ct. 540, 552. But see 25 HARV. L. REV. 57; 12 COL. L. REV. 110.

¹⁰ Regulation seems more properly to be for an administrative board in the first instance. See WYMAN, CONTROL OF THE MARKET, 262.

¹¹ The law of public service corporations has been urged as a solution for the trust problem. See WYMAN, CONTROL OF THE MARKET, 275; 2 WYMAN, PUBLIC SERVICE CORPORATIONS, § 1439.

¹² *State ex rel. Lamar v. Jacksonville Terminal Co.*, 41 Fla. 377, 27 So. 225.

¹³ *Western Union Tel. Co. v. Call Publishing Co.*, 181 U. S. 92, 21 Sup. Ct. 561.

¹⁴ *People ex rel. Hunt v. Chicago & Alton R. Co.*, 130 Ill. 175, 22 N. E. 857.

¹⁵ *Messenger v. Pa. R. Co.*, 36 N. J. L. 407, 37 N. J. L. 531.

¹⁶ See *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 26 Sup. Ct. 272.

servants engaging in a collateral business has led one state, at least, to declare it illegal *per se*,¹⁷ and the remedy of prohibition found expression in the Commodities Clause of the Hepburn Rate Law.¹⁸ The provision for joint ownership is simply a different method of insuring against discrimination.

SUITS CONTESTING OWNERSHIP OF CORPORATE STOCK. — A share of stock in a corporation, apart from any question of the certificate, is a property right of a peculiar nature. While generally considered as personal property,¹ clearly it is not a chose in possession. On the other hand, as it secures a right to participate in profits, a voice in the management of the corporation, and a right to a share of the assets on dissolution,² it is considerably greater than the ordinary transitory right.³ Hence it has sometimes been designated as "in the nature of a chose in action,"⁴ and the statement has even been made that "it is neither a chattel nor a chose in action."⁵ The Supreme Court of Washington has recently gone to the root of the whole question, holding that in an action by a local administrator to have his name entered on the books of a domestic corporation as the owner of certain stock, substituted service on a foreign administrator having possession of the certificates gives the court jurisdiction. *Gamble v. Dawson*, 120 Pac. 1060.

This conclusion necessarily involves the conception of stock as a *res* having a *situs* at the domicile of the corporation. The doctrine is generally recognized that for the purpose of suits contesting its ownership the *situs* of stock is within the state creating the corporation,⁶ and the same view prevails with regard to attachment.⁷ For taxation purposes stock appears to have a somewhat volatile *situs*. It is taxable at the domicile of the corporation, although belonging to a non-resident, as representing the owner's interest in the property,⁸ or because the state creating the corporation can fix the taxation *situs* of its stock at will.⁹ And it is taxable by the state of the holder as existing there in the form of personal estate.¹⁰ This amounts to the conclusion that the owner's in-

¹⁷ *Central Elevator Co. v. People ex rel. Moloney*, 174 Ill. 203, 51 N. E. 254; *Hannah v. People ex rel. Attorney General*, 198 Ill. 77, 64 N. E. 776.

¹⁸ 34 U. S. STAT. AT LARGE, c. 3591, p. 585, FED. STAT., SUPP., 1909, 257.

¹ *Russell v. Temple*, Sup. Ct., Mass., 1798, 3 DANE'S ABR. 108. But see *Price v. Price's Heirs*, 6 Dana (Ky.) 107.

² *Burrall v. Bushwick R. Co.*, 75 N. Y. 211.

³ See *Sargent v. Essex Marine Ry. Co.*, 26 Mass. 202.

⁴ See *Arnold v. Ruggles*, 1 R. I. 165, 174.

⁵ See LOWELL, TRANSFER OF STOCK, § 9. Shares are not things in action within the meaning of the English Bankruptcy Act. *Ex parte Union Bank of Manchester*, L. R. 12 Eq. 354. But see *Colonial Bank v. Whitney*, 11 App. Cas. 426.

⁶ *Jellenik v. Huron Copper Mining Co.*, 177 U. S. 1, 20 Sup. Ct. 559; *Sohege v. Singer Mfg. Co.*, 73 N. J. Eq. 567, 68 Atl. 64.

⁷ *Barber v. Morgan*, 84 Conn. 618, 80 Atl. 791. See also *Masury v. Arkansas National Bank*, 87 Fed. 381. As to attachment of certificates, see 25 HARV. L. REV. 74, 470.

⁸ *Matter of Bronson*, 150 N. Y. 1, 44 N. E. 707.

⁹ *Corry v. Mayor, etc. of Baltimore*, 196 U. S. 466, 25 Sup. Ct. 297. But see *Oliver v. Washington Mills*, 93 Mass. 268.

¹⁰ *Dwight v. Mayor, etc. of Boston*, 94 Mass. 316; *Worthington v. Sebastian*, Treasurer, 25 Oh. St. 1.

terest in the corporation has a double location, and hence such a criterion is of little aid in fixing the true *situs*.

Since the stock, as such, has been created by the incorporating state, and the power of control as regards third persons is lodged there, on a practical as well as theoretical basis the stock must exist in that state.¹¹ A non-resident shareholder may have certain claims on the corporation, but it is only at its domicile that these can be properly enforced, and through its courts that his rights can be efficaciously administered. Some courts have gone so far as to say that the stock represents an indivisible interest in the corporate enterprise¹² — property held by the company for the benefit of the shareholder — but it is submitted that this view, if taken literally, involves an unnecessary disregard of the corporate fiction. Language sounding *in rem*, however, has properly been used in considering the nature of an action questioning the ownership of corporate stock when the adverse claimant is served by publication.¹³ The elements of an ordinary action *in rem* are present, and the analogy strengthens the conclusion in the principal case, while the authorities reach a similar result on questions of garnishment.¹⁴ The proper view would seem to be that the consensual relation of the parties has given rise to an elaborate chose in action of such a stable and permanent nature that in suits regarding its ownership it may be considered as property in the nature of a *res* existing at the domicile of the corporation.¹⁵

LIABILITY OF CHARITABLE CORPORATIONS FOR TORTS. — There are four views as to the extent of immunity of charitable corporations from tort liability. First, general immunity is granted. This was held in the first English case on the whole subject, on the ground that it is a breach of the trust to apply the trust funds to damages.¹ This reasoning was later discredited in England² and has received but slight support in the United States.³ The same conclusion has been reached, however, on

¹¹ But see *In re Clark*, [1904] 1 Ch. 294. In this case an English testator bequeathed all his personal estate in the United Kingdom to A., and all his personal estate in South Africa to B. The court held that shares in a South African company, the certificates of which were in London, passed to A.

¹² See *Jellenik v. Huron Copper Mining Co.*, 177 U. S. 1, 13, 20 Sup. Ct. 559, 563; *Matter of Bronson*, 150 N. Y. 1, 8, 44 N. E. 707, 708.

¹³ *Andrews v. Guayaquil & Quito Ry. Co.*, 69 N. J. Eq. 211, 60 Atl. 568; *Patterson v. Farmington Street Ry. Co.*, 76 Conn. 628, 57 Atl. 853.

¹⁴ *Harris v. Balk*, 198 U. S. 215, 25 Sup. Ct. 625.

¹⁵ For an interesting discussion of the relation of corporation and shareholder as a status, see 34 AM. L. REG. 448; 25 HARV. L. REV. 278.

¹ *Heriot's Hospital v. Ross*, 12 Cl. & F. 507. This was not a case of *respondet superior*.

² *Mersey Docks, etc. Trustees v. Gibbs*, L. R. 1 H. L. 93.

³ *Perry v. House of Refuge*, 63 Md. 20; *Parks v. Northwestern University*, 218 Ill. 381, 75 N. E. 991; *Fire Ins. Patrol v. Boyd*, 120 Pa. St. 624; *Downs v. Harper Hospital*, 101 Mich. 555, 60 N. W. 42. The immunity in these cases was as to torts by agents. *Powers v. Massachusetts Homeopathic Hospital*, 109 Fed. 294, exposes the weakness of the trust-fund doctrine, namely, that the liability of a private trust fund for torts is well recognized.

the more general ground that it is against public policy to diminish charitable funds. *Hill v. President, etc. of Tualatin Academy and Pacific University*, 121 Pac. 901 (Or.).⁴ The second view is that the doctrine of *respondeat superior* does not apply to charitable corporations. An English decision,⁵ later overruled,⁶ had suggested this in the case of a public corporation, and the reasoning was applied to charitable corporations, by the weight of American authority.⁷ Some jurisdictions refused to follow the view rejected by the English courts, but adopted a third position, namely, that an immunity should extend to torts by agents against the beneficiaries of the charity,⁸ but not against outsiders.⁹ Finally there is a fourth view denying immunity altogether.¹⁰

Which doctrine is preferable? The second view, that *respondeat superior* does not apply to public corporations because they are not making any profit appears unsound.¹¹ That doctrine of agency is a rule of expediency which tends practically to decrease the negligence of agents, and which throws on the principal for whom the work is being done the

⁴ This was a case of dangerous premises. Other cases of general immunity are *Whittaker v. St. Luke's Hospital*, 137 Mo. App. 116, 117 S. W. 1189 (dangerous premises); *Adams v. University Hospital*, 122 Mo. App. 675, 99 S. W. 453 (negligence in selecting agent); *Abston v. Waldon Academy*, 118 Tenn. 24, 102 S. W. 351 (dangerous premises). Cf. *Currier v. Trustees of Dartmouth College*, 105 Fed. 886, 117 Fed. 44 (dangerous premises).

⁵ *Holliday v. St. Leonard*, 11 C. B. N. s. 192.

⁶ It had been decided mainly on the trust-fund doctrine and was therefore in effect reversed by the *Mersey Docks* case. Shortly afterwards, however, the express point again arose and Lord Blackburn (who had delivered the opinion of the judges in the House of Lords case) held that a public corporation was liable on *respondeat superior*. *Foreman v. Mayor, etc. of Canterbury*, L. R. 6 Q. B. 214. *Accord*, *Gilbert v. Trinity House*, 17 Q. B. D. 795.

⁷ *Hearns v. Waterbury Hospital*, 66 Conn. 98, 33 Atl. 595; *McDonald v. Massachusetts General Hospital*, 120 Mass. 432; *Jensen v. Maine Eye and Ear Infirmary*, 107 Me. 408, 78 Atl. 898. The cases in note 3 rely in part on this reasoning.

⁸ *Powers v. Massachusetts Homeopathic Hospital*, *supra*.

⁹ *Horden v. Salvation Army*, 199 N. Y. 233, 92 N. E. 626; *Kellogg v. Church Charity Foundation of Long Island*, 128 N. Y. App. Div. 214, 112 N. Y. Supp. 566; *Bruce v. Central M. E. Church*, 147 Mich. 230, 110 N. W. 951. This last case would seem properly to involve no question of *respondeat superior*, but the court overlooks it. See note 12.

¹⁰ *Glavin v. Rhode Island Hospital*, 12 R. I. 411; *Donaldson v. Commissioners, etc. of Hospital in St. John*, 30 N. B. 279.

¹¹ It has been suggested that whatever be the present policy, historically the rule only applies to business relations, where there is possibility of profit. If the doctrine of *respondeat superior* is continuous from the Germanic and Roman law, as has been urged by able writers, the suggestion is clearly wrong. See Holmes, 4 HARV. L. REV. 353-364; Wigmore, 7 HARV. L. REV. 330-337, 383-405. Even if the doctrine was made out of whole cloth in the time of Charles II, when it took its present form, there is nothing to show that such a limitation is sound. It is true that one of the first of the modern cases uses the phrase "for the master's benefit." See *Tuberville v. Stampe*, 1 Ld. Raym. 264, 265 (1698). An examination of the cases shows, however, that it was used merely as the test of whether the servant was doing the work of the principal, and had no reference to profit from that work. Cf. WIGMORE, 7 HARV. L. REV. 392-399. The erroneous conception appears to have originated in *Hall v. Smith*, 2 Bing. 156 (1824) (a case explicable on the ground that the tort was committed by an independent contractor); to have been first squarely accepted in *Holliday v. St. Leonard*, *supra* (1861); and repudiated in *Foreman v. Mayor of Canterbury*, *supra* (1871). Historically, therefore, this limitation appears unsound. See POLLOCK, ESSAYS IN JURISPRUDENCE, 126. Incidentally, no case has suggested exempting an individual from *respondeat superior* on this ground.

burden of injury resulting in the course of its performance.¹² The policy of the rule is no less strong because the principal obtains no pecuniary benefit from the relation of agency; and that should no more excuse him from liability than the fact that he is getting no profit from his property should excuse him from the ordinary liabilities of a landowner.¹³

The next question is whether the first view of complete immunity is more satisfactory. The argument in favor of such immunity is that the social interest in having the resources of a charity unimpaired should be preferred to the interest of the individual injured. The very existence of the cases tends to show that there is some sound policy in the doctrine. Yet it is submitted that the balance is against it, for it is highly unjust in effect to compel an injured person to contribute to a charity against his will.¹⁴ The mere fact that an institution is commendable should not relieve it from its obligations.¹⁵

The courts holding the third view agree in these conclusions, but lay down as another qualification of the rule of *respondeat superior*, that a recipient of charity assumes the risk of an agent's torts. Logically this would be applicable even when the donor is not a charitable institution, and this result has been reached.¹⁶ Accordingly this view does

¹² See POLLOCK, *id.* 114-131; Report of Committee on Employers' Liability, 1876-1877: testimony of Bramwell and Brett, JJ., 1098 *et seq.*, 1915 *et seq.* The rule may be compared to the liability of an owner for injuries committed by animals, or to the Fletcher v. Rylands principle. In each there is liability without fault, and there is responsibility for somewhat more distant effects than are usually considered proximate results. Some objection is made to this imposition of liability without fault and it may be noted that under the German Code the doctrine of *respondeat superior* has been largely done away with. See SCHUSTER, GERMAN CIVIL LAW, pp. 155-157. It is submitted, however, that the doctrine is justified on mainly the same grounds of expediency upon which workmen's compensation acts are being supported.

¹³ If any exception to *respondeat superior* is to be made in the desire to limit a doctrine holding one liable without fault, it certainly ought not be made in the case of corporations; because in their case that ground of objection is particularly weak. For even when a corporation is held for breach of a non-delegable duty such as care of its premises, there is no moral fault in the corporation. The moral fault is in the agent who failed to act, just as in *respondeat superior* the moral fault is in the agent who acted tortiously. Therefore to hold a corporation on *respondeat superior* is no more unjust than to hold it for other torts. That there is no difference in justice or practical effect as to which ground the corporation is being held upon, is shown by the fact that the principal case and those cited in note 4, and one in note 9, seem to assume that *respondeat superior* governs both classes of cases. Cf. Whittaker v. St. Luke's Hospital, *supra*: "The rule of *respondeat superior* (or if not technically that, akin to it)." The importance of the distinction as a matter of analysis is emphasized in Mersey Docks, etc. Trustees v. Gibbs, *supra*, and in Hewett v. Woman's Hospital Aid Association, 73 N. H. 556, 64 Atl. 190.

¹⁴ The injustice is still more striking when the principle is extended to hospitals conducted by railroads, with indirect benefit to themselves. Arkansas Midland R. Co. v. Pearson, 98 Ark. 399, 135 S. W. 917. See 25 HARV. L. REV. 83. This particular case and others like it may well be put, as the court suggests, on the ground that a doctor is usually an independent contractor, and hence *respondeat superior* does not apply.

¹⁵ For a discussion of the analogous question of tort liability of municipal corporations, see 25 HARV. L. REV. 646. The English cases holding municipal corporations liable in municipal functions on *respondeat superior* have been cited in notes 2 and 6.

¹⁶ Wallace v. Casey Co., 132 N. Y. App. Div. 35, 116 N. Y. Supp. 394. Here the philanthropist was a factory-owner.

not represent any principle peculiar to charitable corporations; but as a general doctrine of agency it appears to be based on a totally fictitious presumption and unsupported by any sound policy.¹⁷ It is but another example of the tendency exhibited by courts holding the second view, to engraft exceptions upon the principle of *respondeat superior*. This view, however, suggests a fifth possibility, namely, that charitable corporations should be exempt from all tort liability to beneficiaries. The policy in favor of such a rule would be the one discussed above in connection with absolute immunity; and the objections there urged would be less strong here. Since there is in this country a general recognition of some immunity, this delimitation of it would appear least undesirable.

LIABILITY OF RAILROAD RIGHT OF WAY FOR LOCAL ASSESSMENTS. — The liability of a railroad right of way for local assessments is a matter upon which the authorities are not always clear. In accord with the weight of authority¹ is a recent case in Missouri, in which the right of way was held to be subject to an assessment for street improvements. *Gilsonite Construction Co. v. St. Louis, Iron Mountain & Southern Ry. Co.*, 144 S. W. 1086. The contrary result in a number of cases² and the failure of the courts to give the exact basis of decision has produced an apparent conflict of authority, which, on closer examination, is rather a confusion resulting from differences of local law. It is clear that a denial of liability must rest on one of two grounds: either the statute is unconstitutional; or it does not in terms include the railroad right of way in the description of property subject to assessment.

Almost all the cases which deny liability appear to have been decided on the latter ground. The frequent and misleading objection, that no property can be subject to a local assessment unless actually benefited, is referable to the fact that the statute in question usually provides in terms that only property benefited shall be assessed, and the tribunal authorized has found, as a fact, no benefit.³ In other cases, the courts have held the words of the act, such as "lot or parcel"⁴ and "owner,"⁵ inapplicable to a right of way or the proprietor of a mere easement. The existence of a public policy opposed to the piecemeal sale of rail-

¹⁷ It relies on a far-fetched analogy to the fellow-servant rule, and seems as regrettable as that doctrine. *Wallace v. Casey Co.*, *supra*, also relies upon a line of reasoning somewhat similar to that discussed above, that *respondeat superior* is based on profit, and does not apply when the principal is conferring a benefit on the injured person.

¹ *Chicago, Milwaukee & St. Paul Ry. Co. v. City of Milwaukee*, 133 N. W. 1120 (Wis.); *Louisville, New Albany & Chicago Ry. Co. v. State*, 122 Ind. 443, 24 N. E. 350. See ELLIOTT, RAILROADS, 2 ed., § 786.

² *Southern California Ry. Co. v. Workman*, 146 Cal. 80, 79 Pac. 586.

³ *Village of River Forest v. Chicago & Northwestern Ry. Co.*, 197 Ill. 344, 64 N. E. 364; *State, etc. Co. v. City of Elizabeth*, 37 N. J. L. 330; *People ex rel. Davidson v. Gilon*, 126 N. Y. 147, 27 N. E. 282.

⁴ *Chicago, Rock Island & Pacific Ry. Co. v. City of Ottumwa*, 112 Ia. 300, 83 N. W. 1074.

⁵ *City of Muscatine v. Chicago, Rock Island & Pacific Ry. Co.*, 88 Ia. 291, 55 N. W. 100.

roads,⁶ or any sale whatsoever of the right of way,⁷ has often led to such a strict construction of the statute that the property in question was excluded from its operation. In all these cases, the court decided a purely local question and left the general principle untouched.

In a few cases where the statute clearly applied to the right of way, the power to levy such assessments has been the subject of decision, and almost uniformly sustained as constitutional.⁸ A consideration of the principles underlying the power to levy special assessments adds further weight to the authority of these cases. It is a branch of the taxing power vested in the sovereign, and differs from a real tax only in the method of apportionment. Although in its general theory it presupposes peculiar benefits to the property assessed, the manner of exercise is *primâ facie* a legislative concern. Only an approximate correspondence between benefits and burden can be attained, and the subsequent fact of no benefit will not invalidate an act which is based on a reasonable presumption of benefits to the property affected.⁹ Only when the statute includes within its scope property which in no possible event could be benefited, will the judiciary feel called upon to declare that the legislature has exceeded its power.¹⁰ It cannot be maintained that a railroad right of way is incapable of deriving advantage from a local improvement. Where the railroad is owner of the fee, the possibility of future benefits is sufficient to support the assessment. No property is exempt from this duty by reason of the existing user.¹¹ And where the railroad owns only a so-called easement, the situation is the same;¹² for this qualified proprietorship of less than the fee is, nevertheless, a right to the exclusive use of the surface for any purpose germane to the proper transaction of the business.¹³ Hence an improvement may always be capa-

⁶ Chicago, Milwaukee & St. Paul Ry. Co. v. City of Milwaukee, 89 Wis. 506, 62 N. W. 417. This is only a rule of policy and can be changed by express act of the legislature. Chicago, Milwaukee & St. Paul Ry. Co. v. City of Janesville, 137 Wis. 7, 118 N. W. 182; Ban v. Columbia Southern Ry. Co., 117 Fed. 21.

⁷ City of Boston v. Boston & Albany R. Co., 170 Mass. 95, 49 N. E. 95. This, too, appears to be no more than a rule of public policy, not a restriction on legislative power. See GRAY, LIMITATIONS OF TAXING POWER, § 1919.

⁸ Heman Construction Co. v. Wabash R. Co., 206 Mo. 172, 104 S. W. 67; Louisville & Nashville R. Co. v. Barber Asphalt Paving Co., 197 U. S. 430, 25 Sup. Ct. 466. *Contra*, Allegheny City v. Western Pennsylvania R. Co., 138 Pa. St. 375, 21 Atl. 763.

⁹ French v. Barber Asphalt Paving Co., 181 U. S. 324, 21 Sup. Ct. 625; Louisville & Nashville R. Co. v. Barber Asphalt Paving Co., *supra*; Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. 921.

¹⁰ Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187; Sears v. Street Commissioners of Boston, 173 Mass. 350, 53 N. E. 876.

¹¹ See cases *supra*, note 9.

¹² Northern Pacific Ry. Co. v. City of Seattle, 46 Wash. 674, 91 Pac. 244.

¹³ Elyton Land Co. v. South & North Alabama R. Co., 95 Ala. 631, 10 So. 270; Hollingsworth v. Des Moines & St. Louis R. Co., 63 Ia. 443, 19 N. W. 325. "The easement is not that spoken of in the old law books, but is peculiar to the use of a railroad, which is usually a permanent improvement, a perpetual highway of travel and commerce. . . . The exclusive use of the surface is acquired, and damages assessed on the theory that the easement will be perpetual; so that ordinarily the fee is of little or no value." Smith v. Hall, 103 Ia. 95, 96, 72 N. W. 427, 428. This is rather an "interest in the land" than an easement. See Boyce v. Missouri Pacific R. Co., 168 Mo. 583, 590, 68 S. W. 920, 922; Kansas Central Ry. Co. v. Allen, 22 Kan. 285, 293; ELLIOTT, RAILROADS, 2 ed., § 938.

ble of enhancing the value of the right of way,¹⁴ and local assessments on such property would seem to be well within the constitutional limits of legislative power.

RECOVERY OF MONEY LOANED TO PERSON HAVING NO LEGAL CAPACITY TO CONTRACT. — By the early English law, a person lending money to another who was under a disability had no legal remedy.¹ But in equity the fiction developed that if money was advanced to an infant,² an unsupported wife,³ or a lunatic,⁴ and was in fact spent for necessities, the lender occupied the place of the tradesman who supplied them.⁵ This theory of "subrogation" was recognized by text writers⁶ and was applied in several decisions in this country.⁷ It was even expanded to cover the analogous case of corporations borrowing *ultra vires* and expending the proceeds in paying their legal liabilities.⁸ But lately the theory has fallen into disrepute,⁹ and in England its application to corporations borrowing *ultra vires* has been flatly denied.¹⁰ It seems strange, therefore, that a recent English decision in a case in which the lender sought to recover money advanced to a lunatic and used for necessities should have not only adopted the theory but carried it to its logical extreme. *In re Beavan*, [1912] 1 Ch. 196.¹¹ Although the lending bank was denied all compensation for its services, yet it was actually permitted to recover

¹⁴ *Chatham County Commissioners v. Seaboard Air Line Ry. Co.*, 133 N. C. 216, 45 S. E. 566 (stock law). In *State, Paterson & Hudson River R. Co. v. City of Passaic*, 54 N. J. L. 340, 23 Atl. 945, it was found as a fact that the easement was benefited by a sewer. *Contra*, *Allegheny City v. Western Pennsylvania R. Co.*, *supra*.

¹ *Darby v. Baucher*, 1 Salk. 278; *Earle v. Peale*, 1 Salk. 386.

² *Marlow v. Pitfield*, 1 P. Wms. 558.

³ *Harris v. Lee*, 1 P. Wms. 482; *Jenner v. Morris*, 3 De G., F. & J. 45; *Deare v. Souter*, L. R. 9 Eq. 151.

⁴ *Williams v. Wentworth*, 5 Beav. 325; *Wentworth v. Tubbs*, 1 Y. & C. Ch. 171.

⁵ It would seem that this doctrine of subrogation has not been applied in favor of one who has loaned money to a drunkard; but a recovery in quasi contracts of so much of the loan as has been spent for necessities is permitted. *Haneklan v. Felchlin*, 57 Mo. App. 602. See *Gore v. Gibson*, 13 M. & W. 623, 626; *McCrillis v. Bartlett*, 8 N. H. 569, 572.

⁶ 3 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 1300; SHELDON, SUBROGATION, 2 ed., 365.

⁷ *Kenyon v. Farris*, 47 Conn. 510. See *Walker v. Simpson*, 7 Watts & S. (Pa.) 83. *Cf. Leuppie v. Osborn*, 52 N. J. Eq. 637, 29 Atl. 433.

⁸ *In re Cork, etc. Ry. Co.*, L. R. 4 Ch. 748; *Blackburn Building Society v. Cunliffe, Brooks & Co.*, 22 Ch. D. 61; *Wells v. Town of Salina*, 71 Hun (N. Y.) 559, 25 N. Y. Supp. 134.

⁹ See *In re Rhodes*, 44 Ch. D. 94, 105, 107. In *De Brauwere v. De Brauwere*, 203 N. Y. 460, 96 N. E. 722, the subrogation theory adopted by the court below, 69 N. Y. Misc. 472, 126 N. Y. Supp. 221, was expressly rejected and the same decision reached on quasi-contractual grounds. See 24 HARV. L. REV. 306; 25 HARV. L. REV. 473. In *Skinner v. Tirrel*, 159 Mass. 474, 34 N. E. 692, the theory was repudiated and the lender denied all relief. But the case may, perhaps, be distinguished on the ground that the loan was made to the wife on her own credit.

¹⁰ *In re Wrexham, etc. R. Co.*, [1899] 1 Ch. 440.

¹¹ It is interesting to note that Neville, J., who decided this case, advocated as counsel the application of the subrogation doctrine to corporations borrowing *ultra vires* in the case of *In re Wrexham, etc. R. Co.*, *supra*.

interest where the claims of the creditors to which it was thus subrogated were interest bearing.

That a person lending money to another who is under a disability should have some means of recovering his advances seems obvious, for otherwise incapacitated people might suffer severe deprivation though possessed of considerable resources, for want of credit to enable them to supply their immediate needs. But the remedy by subrogation, besides being fictitious and circuitous, has two marked defects. If the borrower pays cash for his necessities, no debt arises to which the lender can be subrogated; yet surely he is just as worthy of relief. If the borrower becomes insolvent, and the lender happens to be subrogated to the rights of secured creditors, he receives a wholly undeserved priority.¹² It would seem wiser, therefore, to base the lender's right to recover on quasi-contractual principles, and argue that the borrower has been enriched and has a duty to reimburse the person to whom this enrichment is due.¹³ In analogous cases, a surety on an infant's note for necessities who has paid the debt,¹⁴ and one who has paid a debt for necessities at the infant's request, may recover in assumpsit.¹⁵ If the lender's recovery is limited to money actually spent for necessities, it can make no substantial difference to the borrower whether his liability be for money borrowed or for the price of the necessities;¹⁶ and the objection on which the early decisions rest, that the lender might encourage the borrower to squander his funds, ceases to apply.¹⁷ Since, moreover, the obligation to repay is raised by the law regardless of any contractual relation,¹⁸ the technical argument of the old cases¹⁹ that a contract, void when made, cannot later become binding simply because the money is spent for necessities, has no force.²⁰

LIABILITY OF LESSOR RAILROAD FOR ACTS OF LESSEE. — Unlike ordinary corporations, railroads are not permitted to lease their properties to one another without express legislative assent.¹ Where a road is operated under an unauthorized lease, the lessee is regarded as the agent of the lessor, and the latter is held to strict accountability for all its

¹² Cf. *In re Wrexham, etc. R. Co.*, *supra*.

¹³ See *In re Rhodes, supra*, per Cotton, L. J., 105, per Lindley, L. J., 107; KEENER, QUASI CONTRACTS, 19-21; WILLISTON, SALES, §§ 24, 34, 41, 48.

¹⁴ *Conn v. Coburn*, 7 N. H. 368; *Haine's Admr., v. Tarant*, 2 Hill Law (S. C.) 400.

¹⁵ *Randall v. Sweet*, 1 Den. (N. Y.) 460.

¹⁶ See *Kenyon v. Farris, supra*, 517; *Leuppie v. Osborn, supra*, 640.

¹⁷ See *Darby v. Boucher, supra*; *Earle v. Peale, supra*.

¹⁸ See *Trainer v. Trumbull*, 141 Mass. 527, 530; *In re Rhodes, supra*, 105, 107. Cf. *Sceva v. Treu*, 53 N. H. 627; *Sawyer v. Lufkin*, 56 Me. 308.

¹⁹ See *Darby v. Boucher, supra*.

²⁰ Even if the liability be regarded as contractual, there is no good reason why under the modern doctrine that such contracts are voidable rather than void, the contract should not cease to be voidable when the money has been expended for necessities. See WILLISTON, SALES, § 24.

¹ Public service corporations, as a rule, may not lease, sell, or consolidate their properties without legislative consent. See NOYES, INTERCORPORATE RELATIONS, § 177.

agent's acts and omissions.² Even where a lease has been expressly authorized, the courts have repeatedly said that public policy will not permit a railroad to shift its responsibilities.³ The courts have differed, however, as to how far public expediency requires them to modify the usual rules governing the relation between landlord and tenant.⁴ The cases fall into three groups. A lessor is everywhere liable when some positive statutory duty has been omitted.⁵ On the other hand, in probably only two jurisdictions have the courts gone so far as to allow employees of the lessee to look to the lessor for recompense for injuries occasioned by the negligence of the lessee.⁶ Between these two extremes the cases are in conflict,⁷ especially where an outsider has been injured by the negligence of the lessee.⁸

The Supreme Court of Pennsylvania holds that the lessor is not responsible for the lessee's negligence.⁹ It is not surprising, therefore, that in a recent case in that court a lessor was not required to reimburse a shipper for the loss occasioned by the unreasonable discrimination of the lessee. *Moser v. Philadelphia, H. & P. R. Co.*, 82 Atl. 362. Under Pennsylvania statutes certain shippers are entitled, upon demand, to siding facilities. The plaintiff in the principal case had repeatedly but unsuccessfully applied to the lessee to have a siding installed. Because of the peculiar nature of a siding, one judge dissented on the ground that even though the lessor was not liable for the lessee's refusal to handle the plaintiff's goods, it was, nevertheless, the lessor's positive statutory duty to see that a siding was installed. The majority of the court completely answered this objection by pointing out that no demand was ever made upon the lessor.

By thus refusing to make the lessor responsible for the lessee's misconduct, as well in cases of discrimination as in cases of negligence, the court seems to have adopted the sounder view. A contrary view seems difficult to sustain on principle. That it is more advantageous to the public to have two defendants to look to instead of one, as the Georgia court has suggested,¹⁰ is not a legal reason why a lessor should be held for the acts of one who is not in any way his agent. Other courts have chosen a precarious footing by relying on public policy, for their argument comes down to this, that where the legislature has found that

² See *Railroad Co. v. Brown*, 17 Wall. (U. S.) 445, 450; *VanDresser v. Oregon*, etc. R. Co., 48 Fed. 202.

³ See *McCabe's Adm. v. Maysville*, etc. R. Co., 112 Ky. 876, 66 S. W. 1054.

⁴ See *TIFFANY, LANDLORD & TENANT*, § 96.

⁵ See *Hayes v. Northern Pacific R. Co.*, 74 Fed. 279. A lease does not exempt a lessor canal company from liability for not maintaining sufficient bridges across its canal. *Ryerson v. Morris Canal*, etc. Co., 71 N. J. L. 381, 59 Atl. 29.

⁶ *Chicago, etc. R. Co. v. Hart*, 209 Ill. 414, 70 N. E. 654; *Harden v. North Carolina R. Co.*, 129 N. C. 354, 40 S. E. 184. See also 62 CENT. L. J. 181; 18 HARV. L. REV. 152.

⁷ A lessor has been held responsible because its lessee did not stop trains at a station to which tickets had been sold. *Pickens v. Georgia Railroad & Banking Co.*, 126 Ga. 517, 55 S. E. 171.

⁸ In ten states a railroad lessor is liable for the negligence of its lessee. A contrary result has been reached in eleven other jurisdictions. See *NOYES, INTERCORPORATE RELATIONS*, § 219; 20 HARV. L. REV. 334.

⁹ *Pinkerton v. Pennsylvania Traction Co.*, 193 Pa. St. 229, 44 Atl. 284.

¹⁰ *Green v. Coast Line R. Co.*, 97 Ga. 27, 24 S. E. 814.

public policy has justified it in authorizing a company to build a railroad, public expediency does not justify it in authorizing that company to lease the road to another.¹¹ On all ordinary legal principles, a lessee is not the agent of the lessor, but the holder of an estate in the property. The lessor is powerless to terminate the estate, or control the actions of the lessee. To hold a lessor railroad responsible is to make it something more than an involuntary surety. After the legislature has authorized a lease, is a court justified because the lessor once owned the railroad and still retains its franchise and some small future estate in the land, in making it, in substance, an insurer?¹² There is a sound distinction between responsibility for the omission of a positive statutory duty, and liability for the wrongful acts of others.¹³

PRIORITY OF ASSIGNEES UNDER SUCCESSIVE ASSIGNMENTS OF EQUITABLE INTEREST. — If the beneficiary of a trust fund assigns his interest to A. for value and A. gives no notice of the assignment to the trustee; and later the beneficiary purports to assign the same interest to B., who, having no notice of the previous assignment, gives value and notifies the trustee of the transaction, which party is entitled to the fund in the hands of the trustee?¹ The English cases give the second assignee the priority.² New Jersey has recently adopted the English rule.³ *Jenkinson v. New York Finance Co.*, 82 Atl. 36 (N. J.).

When A. sells a chattel to B. and then later purports to sell the same chattel to an innocent purchaser, the purchaser does not get the chattel, for A. has no longer any chattel to sell. But when *Dearle v. Hall*,⁴ the leading English case on successive assignments of equitable interests, was decided,⁵ the rule of law in England was that if A. still had the chattel in his possession, and delivered it to the innocent second purchaser, the purchaser could keep the chattel.⁶ In an earlier case,⁷ moreover, much relied on in *Dearle v. Hall*, it had been decided under the

¹¹ Where the legislature has expressly limited the lessor's liability, even these courts are bound by the legislature's determination as to public policy. See *Singleton v. South Western R. Co.*, 70 Ga. 469.

¹² "The subject has been much discussed and some of the cases are characterized by lack of discrimination between liability for duties absolutely imposed by law upon the lessor company and duties arising from the manner of the operation of the trains." *Hayes v. Northern Pacific R. Co.*, *supra*, 282.

¹³ *Railroad Co. v. Curl*, 28 Kan. 622.

¹ The cases seem to make no distinction on this point between an equitable interest and a chose in action.

² *Dearle v. Hall*, 3 Russ. 1; *Meux v. Bell*, 1 Hare 73. See AMES, CASES ON TRUSTS, 2 ed., 326, note; 1 HARV. L. REV. 10.

³ Two previous New Jersey decisions have uniformly been cited as holding a contrary doctrine, but the court in the principal case seems quite properly to distinguish them. *Executors of Luse v. Parke*, 17 N. J. Eq. 415; *Kamena v. Huelbig*, 23 N. J. Eq. 78. See *Cogan v. Conover Mfg. Co.*, 69 N. J. Eq. 358, 372, 60 Atl. 408, 414.

⁴ *Supra*.

⁵ In 1828.

⁶ *Edwards v. Harben*, 2 T. R. 587 (1788). But cf. *Twyne's Case*, 3 Coke, 80 b.

⁷ *Ryall v. Rowles*, 9 Bligh N. s. 377, 1 Atk. 165, 1 Ves. 348 (1750). *Contra*, *Bartlett v. Bartlett*, 3 Jur. N. s. 284 (1857).

bankruptcy statute that a chose in action was a chattel, and was in the "possession, order and disposition" of the bankrupt so as to pass to his trustees in bankruptcy unless a former assignee had given notice to the debtor.⁸ In both the above cases, the first sale or assignment passed everything that the seller had, and the buyer or assignee was required to do nothing more to complete his title.⁹ It was simply because the seller retained possession of the thing sold that a second *bonâ fide* purchaser was protected. So it was not unnatural that in the case of an equitable interest, equity followed the existing law, and if the assignor could be said to retain possession over the equitable interest, then a second assignee who obtained possession would be protected. Where there are evidences of an equitable interest or a chose in action, as a bond or an insurance policy, it would seem that if the first assignee took possession of them he should be protected.¹⁰ Where such is not the case the nearest approach to taking possession is notification to the trustee or debtor of the assignment.¹¹

Shortly after *Dearle v. Hall* was decided, the English law as to the fraudulent retention of possession of a chattel by the seller was put on a sounder basis,¹² and to-day the better rule seems to be that it is only evidence of fraud.¹³ So if equity had continued to follow the analogy of the law the better rule to-day would perhaps make failure on the part of the first assignee to give notice to the debtor or trustee merely evidence of fraud. But the principal case is in line with the present tendency of decisions in this country.¹⁴ To contend, as the principal case does, that the first assignee has been negligent and so is not entitled to priority would seem to beg the question.¹⁵ It is, however, true that modern business deals largely and freely with equitable interests and choses in action. And it tends, perhaps, to a fairer dealing with such interests to have as an unvarying rule that retention of possession by the assignor is "conclusive evidence" of fraud.

RATIFICATION OF UNAUTHORIZED CONTRACTS OF INSURANCE AFTER OCCURRENCE OF LOSS. — Can a policy of insurance obtained by an unauthorized agent be ratified by his principal after he knows of the loss?¹ Text writers usually state broadly that such ratification is effectual.²

⁸ This latter was only a *dictum*, as the assignee had done nothing.

⁹ See 19 YALE L. J. 258.

¹⁰ *Coffman v. Liggett*, 107 Va. 418, 59 S. E. 392.

¹¹ The doctrine of retention of possession by the seller must not be confused with delivery which under the old law was necessary to perfect title. See WILLISTON, SALES, § 350.

¹² *Martindale v. Booth*, 3 B. & Ad. 498 (1832).

¹³ See WILLISTON, SALES, §§ 352-404.

¹⁴ *Graham Paper Co. v. Pembroke*, 124 Cal. 117, 56 Pac. 627; *Lambert v. Morgan*, 110 Md. 1, 72 Atl. 407; *Phillips's Estate*, 205 Pa. St. 515, 55 Atl. 213.

¹⁵ Negligence is the failure to do something that the law requires to be done, and the very question here is whether the law says that the first assignee has a duty to give notice.

¹ The right is sometimes expressly given by statute. MARINE INSURANCE ACT, 1906 (6 EDW. 7, c. 41), § 86.

² See 2 CLEMENT, FIRE INSURANCE, 481; 1 JOYCE, INSURANCE, § 642; STORY, AGENCY, 7 ed., § 248.

But a recent case denies the right, and suggests that the doctrine be confined to policies procured by a bailee of goods insuring their value both for his own interest and "for account of whom it may concern." *Kline Bros. & Co. v. Royal Ins. Co.*, 192 Fed. 378 (Circ. Ct., S. D. N. Y.). Under such facts it is universally held that the bailee may recover the value of the policy but must hold the excess above his own interest for the owner of the goods.³ It has been argued that this is not ratification, but that the owner is entitled to the excess proceeds as a trust held for his benefit by the bailee.⁴ But if the bailee has not recovered, the owner may sue the insurance company directly.⁵ Moreover, he may sue the bailee at law.⁶ Nor does he recover as the beneficiary of the policy, for he is indemnified only for his own loss, and he may sue in those jurisdictions where only parties to the contract can maintain an action.⁷ Since he is neither a *cestui que trust* nor a beneficiary, he must recover upon the basis of a ratification of the contract made in his behalf, and it was so held in a recent case. *Symmers v. Carroll*, 134 N. Y. Supp. 170 (N. Y., App. Div.).⁸ The fact that the quasi-agent happened to have himself an insurable interest in the property insured in most of the decided cases can furnish no logical ground for distinguishing them.

Against the right of ratification is urged the principle that it is not allowed if it works hardship, or if exercised at a time when the contract itself could not be made.⁹ There seems but slight authority for the latter proposition.¹⁰ In many cases, moreover, a contract of insurance could be made after loss based upon the uncertainty of the amount of the loss.¹¹ As to hardship, if the insurer acted in reliance upon the quasi-agent's authority, he cannot complain if ratification is equivalent to prior authority.¹² If the quasi-agent's lack of authority was known, the insurer must negotiate upon the contingency of ratification and cannot complain whether it occurs or not. In any case of ratification, the right of one party to accept or reject the contract involves speculation at the expense of the other party. Since the insurer may retain the premium if he has received it,¹³ to deny ratification would frequently mean his unjust

³ *Fire Ins. Association v. Merchants, etc. Co.*, 66 Md. 339, 7 Atl. 905; *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 10 Sup. Ct. 365. Some jurisdictions hold that the owner is not limited to the excess but is entitled to a *pro rata* share. *Snow v. Carr*, 61 Ala. 363; *Siter v. Morris*, 13 Pa. St. 218.

⁴ *Robertson v. Hamilton*, 14 East 522; *Stillwell v. Staples*, 19 N. Y. 401.

⁵ *Williams v. North China Ins. Co.*, 1 C. P. D. 757; *Finney v. Fairhaven Ins. Co.*, 5 Met. (Mass.) 192.

⁶ *Snow v. Carr*, *supra*; *Miltenberger v. Beacom*, 9 Pa. St. 198.

⁷ *Williams v. North China Ins. Co.*, *supra*; *Finney v. Fairhaven Ins. Co.*, *supra*.

⁸ The contract after ratification is made with the owner, but the bailee may recover from the insurer since his principal is partly undisclosed.

⁹ See 20 HARV. L. REV. 504.

¹⁰ See *Cook v. Tullis*, 18 Wall. (U. S.) 332, 338; *MECHEM, AGENCY*, § 126. These authorities fail to distinguish this from the intervention of rights of third parties as a ground for refusing to allow ratification.

¹¹ *Cf. Seward v. Mitchell*, 1 Cold. (Tenn.) 87; *Supreme Assembly v. Campbell*, 17 R. I. 402, 22 Atl. 307.

¹² If the principal fails to ratify, the insurer may hold the quasi-agent for all loss suffered thereby under the doctrine of *Collen v. Wright*, 8 E. & B. 647.

¹³ See *STORY, AGENCY*, 7 ed., § 248. The money was paid with full knowledge of the facts. There is no failure of consideration since the insurer's performance is necessarily conditional upon ratification.

enrichment. But it seems immaterial that the quasi-agent has not paid the premium, though that is one of the grounds of decision in the federal case. After ratification, consideration moves from the principal; before that, there seems no necessity for consideration except such assent upon the part of the quasi-agent as may keep the insurer's promise open.

In England, where there may be no withdrawal until there has been an opportunity for ratification,¹⁴ the occurrence of the loss seems immaterial to prevent it. Even if, more properly, the agreement before ratification can be revoked,¹⁵ the loss should not effect a revocation without direct communication between the parties. It is like a change in the market making an offer manifestly unprofitable to the offeror but not preventing acceptance by the offeree.¹⁶ Even if the acceptance of an offer after an un contemplated change in the situation would be fraudulent, it does not follow that ratification would be, since the unratified contract is more permanent than an offer. Since it purports to take effect immediately, it necessarily contemplates the possibility of such a change as loss of the property taking place before ratification.

SPECIFIC PERFORMANCE WITH ABATEMENT OF PURCHASE PRICE. —

It is settled, as a general principle in equity, that where a vendor of land is unable to make a perfect title to all the land he has contracted to convey, the purchaser is entitled to a conveyance of such interests as the vendor may have, with an abatement of the purchase price proportionate to the deficiency.¹ It has been suggested as an explanation of this doctrine that the vendor, having asserted a title to the entirety, is now estopped to deny it.² But the decree cannot logically be based upon the assumption that the interest of the vendor is the entirety of the subject matter called for by the contract, since an abatement of the purchase money is allowed. It should be recognized that the court is, in fact, executing a contract the parties never made.³ The justification lies in the great hardship upon a purchaser if he is left to his remedy at law, and the comparatively slight hardship upon the vendor in compelling him to convey part of that which he has contracted to convey for a compensation on approximately the basis contracted for by the parties.⁴

¹⁴ *Bolton Partners v. Lambert*, 41 Ch. D. 295; *In re Tiedemann*, [1899] 2 Q. B. 66.

¹⁵ See 9 HARV. L. REV. 60.

¹⁶ It was held in *Dickinson v. Dodds*, 2 Ch. D. 463, that knowledge by the offeree of the offeror's intention to revoke prevented acceptance. For criticisms of this case, see LANGDELL, SUMMARY OF THE LAW OF CONTRACTS, 245; WALD'S POLLOCK, CONTRACTS, 3 ed., 33.

¹ *Hill v. Buckley*, 17 Ves. 394; *Barnes v. Woods*, L. R. 8 Eq. 424. See *Mortlock v. Buller*, 10 Ves. 201, 315. The fact that there is a want of mutuality of remedy to such a contract has given pause to some courts. See *Lawrenson v. Butler*, 1 Sch. & Lef. 13, 18; *Graham v. Oliver*, 3 Beav. 124, 128. But it has not proved an insuperable objection. See FRY, SPECIFIC PERFORMANCE OF CONTRACTS, 5 ed., §§ 474, 475, 476.

² See *Rudd v. Lascelles*, [1900] 1 Ch. 815, 818.

³ See *Thomas v. Dering*, 1 Keen 729, 746, 747; DART, VENDORS & PURCHASERS, 7 ed., 1079; FRY, SPECIFIC PERFORMANCE OF CONTRACTS, 5 ed., § 1268. The Scotch law refuses thus to make over a contract. See *Stewart v. Kennedy*, 15 App. Cas. 75, 102.

⁴ This argument has a peculiar force in jurisdictions where in an action at law the

And it is conceived that the reason why the doctrine is not applied where the purchaser in contracting was aware of the defect⁵ is not that his knowledge defeats an estoppel, but that there is less hardship in denying this extraordinary relief to a purchaser with knowledge of the hazard attending the vendor's ability to perform, than to a purchaser without such knowledge.⁶ And so although the defect is known, where the vendor assures the purchaser of his ability to procure from a third person the concurrence necessary to a perfect title, the balance is in the purchaser's favor.⁷ The authorities do not limit the application of the doctrine to cases where the deficiency is not very great.⁸ Where, however, the value of the part the vendor is unable to convey is purely conjectural, such relief would mean not only the execution of a new contract, but compensation at a rate substantially different from that fixed by the parties, and is accordingly denied.⁹

A phase of this question which has given much difficulty arises where the vendor's wife refuses to release her right to dower. Several courts have treated this as a case for specific performance with an abatement or indemnity.¹⁰ The purchaser has been protected in various ways. He has been allowed to retain or to have set aside a sufficient portion of the purchase money as an indemnity.¹¹ Other courts deduct from the purchase money the present cash value¹² of the inchoate right to dower.¹³ The Wisconsin court adopted this view in a recent case. *O'Malley v. Miller*, 134 N. W. 840. By a view which has considerable support, and which, it is submitted, is most consonant with reason, the purchaser is denied specific performance with an abatement or indemnity except where the wife's refusal is procured by the husband,¹⁴ on the ground that in a given case the value of the dower right is purely con-
 jec-

purchaser of land is not allowed damages for the loss of his bargain. *Bain v. Fothergill*, L. R. 7 H. L. 158.

⁵ *Castle v. Wilkinson*, L. R. 5 Ch. 534; *Lucas v. Scott*, 41 Oh. St. 636. *Contra*, *Walker v. Kelly*, 91 Mich. 212, 51 N. W. 934.

⁶ *Peeler v. Levy*, 26 N. J. Eq. 330.

⁷ *Barker v. Cox*, 4 Ch. D. 464; *Wilson v. Williams*, 3 Jur. N. S. 810.

⁸ *Hooper v. Smart*, L. R. 18 Eq. 683; *Burrow v. Scammell*, 19 Ch. D. 175.

⁹ *Bainbridge v. Kinnaird*, 32 Beav. 346 (property subject to a contingent charge); *Westmacott v. Robins*, 4 De G., F. & J. 390 (property subject to forfeiture for breach of conditions); *Rudd v. Lascelles*, *supra* (property incumbered by restrictive covenants). See *Cato v. Thompson*, 9 Q. B. D. 616, 618.

¹⁰ See POMEROY, *CONTRACTS*, 2 ed., §§ 460, 461, 462, 463.

¹¹ *Wannamaker v. Brown*, 77 S. C. 64, 57 S. E. 665 (vendor entitled to interest on part of purchase money retained); *Bradford v. Smith*, 123 Ia. 41, 98 N. W. 377 (vendor not entitled to interest on part of purchase money retained); *Wilson v. Williams*, *supra*. An early English case compelled the vendor to furnish indemnity at the suit of the purchaser. *Milligan v. Cooke*, 16 Ves. 1. Later English cases denied this right in the vendor. *Balmanno v. Lumley*, 1 Ves. & B. 224. See *Paton v. Brebner*, 1 Bligh 42, 66. In *Wilson v. Williams*, *supra*, the court apparently followed the one and disregarded the other without adverting to either. A case decided since *Wilson v. Williams* reasserts the doctrine of *Balmanno v. Lumley*. *Bainbridge v. Kinnaird*, *supra*.

¹² This is computed by ascertaining the present value of an annuity for the life of the wife equivalent to the interest in the third of the proceeds to which her contingent right of dower attaches and deducting therefrom the value of a similar annuity depending upon the joint lives of herself and husband. See *Jackson v. Edwards*, 7 Paige (N. Y.) 386, 408; *GIAUQUE AND MCCLURE'S PRESENT VALUE TABLES*, 6, 7.

¹³ *Woodbury v. Luddy*, 14 All. (Mass.) 1; *Martin v. Merritt*, 57 Ind. 34.

¹⁴ *Young v. Paul*, 10 N. J. Eq. 401.

tural; and that such relief necessitates a departure from the bargain entered into by the parties so great as to work an undue hardship on the vendor.¹⁵

INDIANS AND THE UNITED STATES. — On the discovery of America, the governments of the old world, to regulate among themselves the right of acquisition, adopted the principle that discovery should give title to the government under which it was made against all other European governments.¹ This principle, although vesting title to the soil in the nation which made the discovery, as against other European nations, was understood not to affect the right of the aboriginal inhabitants to occupancy, but merely to confer on the discoverer the exclusive right to purchase their lands.² By the various charters granted by the King of Great Britain, this title to the soil with the right of preëmption was vested in the colonies, continued in them after the establishment of their independence, and was ceded by them in most cases to the federal government,³ which also by the Constitution was granted the exclusive power to regulate commerce with the Indian tribes.⁴ The United States government continued to deal with the Indians by treaties, made as in the case of treaties with foreign nations,⁵ and becoming the supreme law of the land.⁶ The Indian tribes and nations were regarded as semi-independent communities, administering their own internal governments, but never from the first acknowledged as foreign states.⁷ In 1871 this semi-independence was substantially repudiated by a statute providing that the United States should no longer deal with them by treaty.⁸

From the earliest times, however, the Indians have been regarded as wards of the United States, and the tribes as domestic dependent nations over which the United States might exercise full power of guardianship.⁹ They may be governed by acts of Congress, as well as controlled by treaties.¹⁰ Their land may be disposed of without their consent and no question of deprivation of vested rights without due process of law is thereby raised.¹¹ The constitutional power to regulate commerce with the Indian tribes applies wherever the tribes exist,¹² although their members have become citizens of a state and the commerce occurs out-

¹⁵ *Reilly v. Smith*, 25 N. J. Eq. 158; *Humphrey v. Clement*, 44 Ill. 299. Cf. *Kuratli v. Jackson*, 118 Pac. 192 (Or.). The reasoning of the Pennsylvania court in *Riesz's Appeal*, 73 Pa. St. 485, that relief is refused because of the pressure it would exert on the wife seems unnecessary and is not persuasive.

¹ See *Johnson v. M'Intosh*, 8 Wheat. (U. S.) 543, 573.

² See *Worcester v. Georgia*, 6 Pet. (U. S.) 515, 544.

³ See *Johnson v. M'Intosh*, *supra*, 586.

⁴ U. S. CONST., Art. I, § 8. See *Worcester v. Georgia*, *supra*, 580.

⁵ See *Holden v. Joy*, 17 Wall. (U. S.) 211, 242, 247.

⁶ *Fellows v. Blacksmith*, 19 How. (U. S.) 366.

⁷ *Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 1. It has been held that a state may purchase land by treaty from the Indians, under the supervision of the United States. *Seneca Nation v. Christie*, 126 N. Y. 122, 27 N. E. 275.

⁸ U. S. REV. STAT., 1875, § 2079.

⁹ See *Cherokee Nation v. Georgia*, *supra*, 17.

¹⁰ *United States v. Kagama*, 118 U. S. 375, 6 Sup. Ct. 1109.

¹¹ *Lone Wolf v. Hitchcock*, 19 App. D. C. 315, aff'd in 187 U. S. 553, 23 Sup. Ct. 216.

¹² *Adams v. Freeman*, 50 Pac. 135 (Ok.).

side of the reservation.¹³ On the other hand, the United States has a duty to protect its wards and, as incident to that duty, has certain rights against third parties. It may sue to enjoin interference with Indians' fishing rights;¹⁴ to restrain the collection of taxes from Indians to whom lands have been allotted;¹⁵ and to set aside contracts obtained by fraud from Indians who are citizens of a state.¹⁶ In a recent case, the Supreme Court held that the United States could sue to cancel conveyances made by Indians contrary to the statute under which the lands had been allotted, and that the absence of pecuniary interest in the controversy was immaterial. *Heckman v. United States*, 32 Sup. Ct. 424.¹⁷ Conversely, the United States by the various Depredation Acts has assumed the responsibility for injuries committed by its wards upon third persons.¹⁸

The Indian himself is not a citizen of the United States by birth since not born subject to the jurisdiction thereof.¹⁹ Nor can he become a citizen under the general naturalization law because he does not comply with the color requirement.²⁰ The Dawes Act,²¹ however, in conferring citizenship upon all Indians born within the United States to whom lands have been allotted or who live apart from tribes and have adopted the habits of civilized life, has widely extended this privilege. But even citizenship under this act does not remove the member of an Indian tribe from his position, as ward of the nation.²²

RECENT CASES.

AGENCY — NATURE AND INCIDENTS OF RELATION — FATHER'S LIABILITY FOR TORTS OF SON. — The plaintiff was injured by the defendant's automobile, due to its negligent operation by the defendant's minor son. The son was using the car on a pleasure trip of his own without his father's knowledge but pursuant to a general permission to use it. *Held*, that the defendant is liable. *Stowe v. Morris*, 144 S. W. 52 (Ky.).

The court reasons that the son was the general agent of his father, because the machine was bought for the family pleasure and he was deriving pleasure from its operation. The act of driving the car plus the purpose for which it

¹³ *United States v. Holliday*, 3 Wall. (U. S.) 407.

¹⁴ *United States v. Winans*, 73 Fed. 72.

¹⁵ *United States v. Rickert*, 188 U. S. 432, 23 Sup. Ct. 478.

¹⁶ *United States v. Boyd*, 68 Fed. 577.

¹⁷ The fact that the Indian grantors were not joined and that the United States was not suing as trustee of the legal title was held immaterial. *Cf. United States v. Flournoy*, etc. Co., 71 Fed. 576.

¹⁸ The first act guaranteed eventual indemnification. 4 U. S. STAT. AT LARGE, 729, § 17. This was later repealed. 11 U. S. STAT. AT LARGE, 388, § 8. A later statute makes the United States liable when the Indian defendants are without funds and belong to a tribe in amity with the United States. 26 U. S. STAT. AT LARGE, 851, § 1. When the Indian offenders are unknown the United States is liable alone. *United States v. Gorham*, 165 U. S. 316, 17 Sup. Ct. 382.

¹⁹ *Elks v. Wilkins*, 112 U. S. 94, 5 Sup. Ct. 41.

²⁰ *In re Camille*, 6 Fed. 256.

²¹ 24 U. S. STAT. AT LARGE, 388, § 6.

²² *State v. Columbia George*, 39 Or. 127, 65 Pac. 604.

was bought is thus made to determine the agency. The important question should be whether the son was using the machine for his own purposes. Though the father may derive some incidental benefit by his son's pleasure, it is an argument more fictitious than real to say that the son becomes his father's agent to supply himself with pleasure. It is a mere evasion of the rule that a parent is not liable for the torts of his child. *Kumba v. Gilham*, 103 Wis. 312, 79 N. W. 325; *Chastain v. Johns*, 120 Ga. 977, 48 S. E. 343. Where the son has a general permission to drive the family horse, the father has been held not liable. *Maddox v. Brown*, 71 Me. 432. And it has become well settled that an automobile is not *per se* a dangerous machine. *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351; *Cunningham v. Castle*, 127 N. Y. App. Div. 580, 111 N. Y. Supp. 1057. On facts similar to those of the principal case the opposite result has been reached. *Doran v. Thomsen*, 76 N. J. L. 754, 71 Atl. 296; *Maher v. Benedict*, 123 N. Y. App. Div. 579, 108 N. Y. Supp. 228. *Contra*, *Daily v. Maxwell*, *supra*.

AGENCY — RATIFICATION OF UNAUTHORIZED CONTRACTS — CONTRACT OF INSURANCE RATIFIED AFTER OCCURRENCE OF LOSS. — A contract of insurance was made by an unauthorized agent on behalf of the plaintiff but the premium was not paid. *Held*, that ratification after loss is ineffectual. *Kline Bros. & Co. v. Royal Ins. Co.*, 192 Fed. 378 (Circ. Ct., S. D. N. Y.).

A shipowner insured himself as "carrier, or for account of whom it may concern" upon a cargo of goods and after a total loss collected the amount of the policy. The owner of the cargo sued him for the money remaining after his loss as carrier was covered. *Held*, that the suit is a ratification and the plaintiff may recover. *Symmers v. Carroll*, 134 N. Y. Supp. 170 (N. Y., App. Div.). See NOTES, p. 729.

AMBASSADORS AND CONSULS — RIGHT OF CONSUL TO BE APPOINTED ADMINISTRATOR OF FOREIGN DECEDENT'S ESTATE. — Under the most favored nation clause in a treaty, an Italian consul applied for letters of administration upon the estate of a deceased Italian. The treaty with the most favored nation provided that the consul might "intervene in the possession, administration, and judicial liquidation of the estate" of a deceased citizen of his nation "for the benefit of creditors and legal heirs." *Held*, that granting letters of administration to the public administrator is not error. *Rocca v. Thompson*, 32 Sup. Ct. 207.

The question here involved is important, inasmuch as at least two other treaties have a like provision. TREATY WITH SPAIN OF JULY 3, 1902, Art. XXVIII, 33 U. S. STAT. AT LARGE 2120; CONVENTION WITH GREECE OF DEC. 2, 1902, Art. XI, 33 U. S. STAT. AT LARGE 2129. This decision has settled the law on the point against the weight of authority in the state courts. *In re Wyman*, 191 Mass. 276, 77 N. E. 379; *Carpigiani v. Hall*, 55 So. 248 (Ala.); *Matter of Scutella*, 145 N. Y. App. Div. 156, 129 N. Y. Supp. 20. *Contra*, *Matter of Logiorato*, 34 N. Y. Misc. 31, 69 N. Y. Supp. 507. It is the duty of an American consul only to deliver up the effects of the deceased to his legal representative. U. S. REV. STAT., 1878, § 1709. Since every state has the control over the administration of estates within its territories, it would seem that the treaty should expressly state the fact, if this right is to be ceded. *Lanfear v. Ritchie*, 9 La. Ann. 96. See 5 MOORE, DIG. INT. LAW, 123. In other treaties it has been expressly stipulated. TREATY WITH PERU OF AUG. 31, 1887, Art. XXXIII, 25 U. S. STAT. AT LARGE, 1461. Moreover, the correspondence between the parties to the treaty with Italy shows that the consul was not meant to have the right of administration, since the Italian ambassador requested a change to that effect and was answered that such a change was impracticable on account of the large amount of territory covered by one

consul. See 5 MOORE, DIG. INT. LAW, 122-123. The technical meaning of the word "intervene" is to come into a proceeding already instituted, and it is entirely reasonable to assume that all that was meant to be given was a right to come in and represent absent heirs or creditors. Cf. *Succession of Rabasse*, 47 La. Ann. 1454.

BANKRUPTCY — PROPERTY PASSING TO TRUSTEE — LIFE INSURANCE POLICIES. — A bankrupt had a policy of insurance on his life which had no cash surrender value. The Bankruptcy Act, § 70 a (5), provides "that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may . . . pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own and carry such policy . . . , otherwise the policy shall pass to the trustee as assets." *Held*, that the policy does not pass to the trustee. *In re Judson*, 192 Fed. 834 (C. C. A., Second Circ.).

For a discussion of the principles involved, see 24 HARV. L. REV. 317.

BANKRUPTCY — STATE BANKRUPTCY AND INSOLVENCY LAWS — EFFECT OF NATIONAL BANKRUPTCY LAW ON STATE LAWS. — The National Bankruptcy Act, § 4 b, provides that a farmer cannot be forced into involuntary bankruptcy. *Held*, that a farmer may be forced into involuntary bankruptcy under a state law. *Lace v. Smith*, 82 Atl. 268 (R. I.).

For a discussion of the principles involved, see 22 HARV. L. REV. 547.

BILLS AND NOTES — NEGOTIABILITY — NOTE RECITING ITS CONSIDERATION TO BE A CONDITIONAL SALE. — A note recited that its consideration was the sale of a chattel, the title to which was to remain in the seller until the note was paid, the risk of loss to be upon the buyer, the maker to furnish security when demanded, and if the maker disposed of any of his property, the payee to have the right to declare the note due. *Held*, that this note is not negotiable. *Molsons Bank v. Howard*, 21 Ont. Wkly. Rep. 278.

To be negotiable a note must be unconditional and certain in time. *Hartley v. Wilkinson*, 4 M. & S. 25; *Mahoney v. Fitzpatrick*, 133 Mass. 151. A recital in a note of the consideration for which it was given does not make its promise conditional. *Hereth v. Meyer*, 33 Ind. 511; *Siegel v. Chicago, etc. Bank*, 131 Ill. 569, 23 N. E. 417. But if the consideration is stated to be an executory promise to be performed before or at maturity, then the maker's promise is conditional. *Hodges v. Hall*, 5 Ga. 163; *Fletcher v. Thompson*, 55 N. H. 308. In a conditional sale with the risk of loss on the seller, there is in substance, as in form, an executory contract, the seller to perform when the price is paid, and hence the recital of this on a note makes its promise conditional. *Sloan v. McCarty*, 134 Mass. 245. But if the risk of loss is on the buyer, the so-called conditional sale is in substance an executed sale with a mortgage back, and the maker's promise is absolute. *Chicago Ry. Equipment Co. v. Merchants' Bank*, 136 U. S. 268, 10 Sup. Ct. 999. The decision in the principal case would, therefore, be based more properly on the ground that the provisions allowing the payee to declare the note due upon certain conditions make the time of payment uncertain. *First National Bank v. Bynum*, 84 N. C. 24; *Carrol, etc. Bank v. Strother*, 28 S. C. 504, 6 S. E. 313. Also, the promise to give additional security, a promise to do something other than pay money, may perhaps make the note non-negotiable. *Holliday State Bank v. Hoffman*, 85 Kan. 71, 116 Pac. 239. *Contra*, *Dowie v. Joyner*, 25 S. C. 123.

BILLS OF PEACE — COMMON ISSUES AS BASIS FOR EQUITY JURISDICTION. — Several persons sued a telephone company in tort for removing telephones from their premises. The company filed a bill in chancery to have

the suits enjoined and its liability determined in equity. *Held*, that the bill should be dismissed. *Cumberland Tel. & Tel. Co. v. Williamson*, 57 So. 559 (Miss.)

This case abrogates in Mississippi Pomeroy's doctrine of multiplicity of suits, adopted in *Whilock v. Yazoo & Mississippi Valley R. Co.*, 91 Miss. 779, 45 So. 861. It rehabilitates *Tribette v. Illinois Central R. Co.*, 70 Miss. 182, 12 So. 32. See 25 HARV. L. REV. 559.

CHARITIES AND TRUSTS FOR CHARITABLE[®] USES — RIGHTS AND LIABILITIES OF CHARITABLE ORGANIZATIONS — DANGEROUS CONDITION OF PREMISES. — A licensee was injured by a spring gun on the premises of the defendant, a charitable corporation. *Held*, that the defendant is not liable. *Hill v. President, etc. of Tualatin Academy and Pacific University*, 121 Pac. 901 (Or.). See NOTES, p. 720.

CHattel MORTGAGES — RECORDING AND REGISTRY — WHAT CREDITORS ARE PROTECTED. — A state statute provided that no mortgage should be valid against creditors until lodged for record. Subsequent creditors had no notice of an unrecorded chattel mortgage, but secured no lien on the mortgaged property. *Held*, that the mortgage is valid as against the creditors. *Holt v. Crucible Steel Co.*, U. S. Sup. Ct., Apr. 1, 1912.

The extent to which statutes such as that in the principal case protect those who become creditors of the mortgagor without notice of a prior unrecorded chattel mortgage varies in different states. Some courts give the mortgagee precedence over all creditors who have obtained no property interest in the mortgaged chattel before the recording of the mortgage. *Overstreet v. Manning*, 67 Tex. 657, 4 S. W. 248. The lien acquired by attachment is such an interest. *Wicks v. McConnell*, 102 Ky. 434, 43 S. W. 205. And creditors of a deceased insolvent debtor have been held to have the requisite interest in his property. *Currie v. Knight*, 34 N. J. Eq. 485. *Contra*, *Folsom v. Peru Plow & Implement Co.*, 69 Neb. 316, 95 N. W. 635. Another view requires merely that the creditor secure judgment against the debtor and execution upon the property, even though this be done after the recording of the mortgage. *Thompson v. Van Vechten*, 27 N. Y. 568. *Cf.* *Jones v. Graham*, 77 N. Y. 628. And not even this is required when the circumstances make such procedure impossible. *Skilton v. Codrington*, 185 N. Y. 80, 77 N. E. 790. A third view postpones the mortgage to all subsequent claims acquired without notice of it. *Dempsey v. Pforzheimer*, 86 Mich. 652, 49 N. W. 465. This most conforms to the letter of the statute and to its purpose, the protection of creditors who rely upon the apparent assets of their debtor. The effect of notice to the creditor is not involved in the principal case.

CHOSes IN ACTION — MANNER AND EFFECT OF ASSIGNMENT — PRIORITY OF NOTICE TO OBLIGOR: EFFECT IN CASE OF SUCCESSIVE ASSIGNMENTS OF EQUITABLE CHOSE IN ACTION. — The beneficiary of a trust fund assigned part of the fund to A., who failed to give notice of the assignment to the trustee. The beneficiary later assigned all his right, title and interest in the fund to B., who was ignorant of the previous assignment. It did not clearly appear whether B. made any inquiries of the trustee, but he notified the trustee of his assignment. *Held*, that B. is entitled to priority. *Jenkinson v. New York Finance Co.*, 82 Atl. 36 (N. J.). See NOTES, p. 728.

CONFLICT OF LAWS — PERSONAL JURISDICTION — FOREIGN ENFORCEMENT OF STATUTORY LIABILITY OF STOCKHOLDERS FOR DEBTS OF INSOLVENT CORPORATION. — The statutory receiver of an insolvent Minnesota corporation brought suit in Wisconsin to enforce the double liability of stockholders of

the corporation. *Held*, that the suit is maintainable. *Converse v. Hamilton*, 32 Sup. Ct. 415.

For a discussion of the principles involved, see 23 HARV. L. REV. 37.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — LIABILITY OF RAILROAD RIGHT OF WAY TO LOCAL ASSESSMENT. — A city levied a special assessment for street improvements on adjacent property including the railroad right of way. *Held*, that this does not deprive the railroad of property without due process of law. *Gilsonite Construction Co. v. St. Louis, Iron Mountain & Southern Ry. Co.*, 144 S. W. 1086 (Mo.). See NOTES, p. 723.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — OWNER CHARGED WITH CONTRACTOR'S DEBTS IN DEFAULT OF REQUIRING BOND FOR THEIR PAYMENT. — A statute provided that every owner should take from a person contracting for the construction of his ditch or canal a bond for the payment of all debts for labor, materials, provisions, or goods of any kind, incurred in carrying on the work, or the owner should be liable for debts so contracted. The plaintiff sued an owner under this statute on an account for fodder, clothing, provisions, and other supplies furnished to a contractor. *Held*, that the statute is unconstitutional. *Bolln Co. v. North Platte Valley Irrigation Co.*, 121 Pac. 22 (Wyo.).

In general the due process clause renders unconstitutional any taking of property from one person to pay the debts of another. See *Camp v. Rogers*, 44 Conn. 291, 297; *Jones v. Great Southern Fireproof Hotel Co.*, 86 Fed. 370, 388. In some special relations, it may not be unreasonable under the police power to hold one sponsor for another's obligations. Thus liability can be imposed on initial carriers for damages caused by connecting carriers. *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164. Landlords can be made responsible for the unpaid water rents of tenants. *City of East Grand Forks v. Luck*, 97 Minn. 373, 107 N. W. 393. Wherever sub-contractors are given a direct mechanic's lien, independent of the contractor, the owner is likewise charged with another's debt. But this is by reason of the equity binding his property to answer for labor or materials that have directly enriched it. *Davis v. Alvord*, 94 U. S. 545; *Foster v. Dohle*, 17 Neb. 631, 24 N. W. 208. See 25 HARV. L. REV. 274. Personal liability within the same limits has been upheld. *Hart v. Boston, etc. R. Co.*, 121 Mass. 510. But a statute similar to that in the principal case has been held unconstitutional, though confined to debts for which a lien could be given. *Gibbs v. Tally*, 133 Cal. 373, 65 Pac. 970. At least that result is unimpeachable where, as here, the benefit of the goods supplied accrued not directly to the property but to the contractor's ordinary business equipment. Cf. *McCormick v. Los Angeles City Water Co.*, 40 Cal. 185; *Perrault v. Shaw*, 69 N. H. 180.

CONTRACTS — SUITS BY THIRD PERSONS NOT PARTIES TO CONTRACT — ACTION BY PEDESTRIAN AGAINST STREET RAILWAY FOR BREACH OF ITS CONTRACT WITH CITY TO KEEP SIDEWALKS IN REPAIR. — A street railway company agreed to keep a sidewalk in repair as one of the terms upon which the city granted the use of a street. The sidewalk became out of repair, in consequence of which the plaintiff was injured. *Held*, that she can recover damages from the company. *Jenree v. Metropolitan Street Ry. Co.*, 121 Pac. 510 (Kan.).

Even in jurisdictions which permit a beneficiary to sue upon a contract, it is held that the contract must be primarily intended for his benefit. *New Orleans St. Joseph's Association v. Magnier*, 16 La. Ann. 338. But if the beneficiary has a legal or equitable claim against the promisee for the advantage which the promisor has agreed to confer, no such primary intent is necessary. *Lawrence v. Fox*, 20 N. Y. 268. A city owes no duty to its citizens to maintain

a given water pressure. *Van Horn v. City of Des Moines*, 63 Ia. 448, 19 N. W. 293; *Wright v. City Council of Augusta*, 78 Ga. 241. So the fact that a householder is incidentally benefited by a contract between a water company and the city is held insufficient to permit recovery for losses due to the company's failure to maintain the agreed pressure. *Mott v. Cherryvale Water & Mfg. Co.*, 48 Kan. 12, 28 Pac. 989; *Becker v. Keokuk Waterworks*, 79 Ia. 419, 44 N. W. 694. *Contra*, *Gorrell v. Greensboro Water Supply Co.*, 124 N. C. 328, 32 S. E. 720. Some recent cases regard maintenance of pressure as within the public duty of a water company. *Guardian Trust & Deposit Co. v. Fisher*, 200 U. S. 57, 26 Sup. Ct. 186; *Mugge v. Tampa Waterworks Co.*, 52 Fla. 371, 42 So. 81. But as repairing a sidewalk is obviously not within a street railway's public calling, and as there is no evidence of misfeasance, the decision in the principal case can be sustained only on a beneficiary theory. As the city owes a legal duty to each pedestrian to keep the highway in repair, the case properly falls into the class where intent to benefit the beneficiary is immaterial. See *City of Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475, 485; *McMahon v. Second Avenue R. Co.*, 75 N. Y. 231, 237.

CORPORATIONS — CAPITAL, STOCK, AND DIVIDENDS — SUIT CONTESTING OWNERSHIP OF STOCK. — An intestate died in Maryland owning stock in a Washington corporation. The local administrator in Washington filed a bill against the corporation to have his name placed on the corporate books as the owner of this stock, and served the Maryland administrator by publication. *Held*, that jurisdiction over the foreign administrator has been acquired. *Gamble v. Dawson*, 120 Pac. 1060 (Wash.). See NOTES, p. 719.

CRIMINAL LAW — SENTENCE — POWER OF COURT TO SUSPEND ITS IMPOSITION OR ITS ENFORCEMENT. — A court postponed the sentence of a convicted prisoner and at a later term sentenced her to prison. *Held*, that she is legally imprisoned. *Gehrmann v. Osborne*, 82 Atl. 424 (N. J., Ct. Ch.).

A court provided in its sentence that execution of the same should be suspended during good behavior. The defendant was at liberty for a longer period thereafter than the term imposed by the sentence. *Held*, that the defendant can be made to serve out his term although the provision for suspension is void. *Daniel v. Persons*, 74 S. E. 260 (Ga.); *Fuller v. State*, 57 So. 806 (Miss.).

The question of the inherent power of a court to suspend the pronouncement of sentence or to stay its enforcement has produced a great variety of authorities. See note to *State v. Abbott*, 33 L. R. A. N. S. 112. The exercise of either by the court has been objected to as an encroachment on the pardoning power of the executive. *People v. Blackburn*, 6 Utah 347, 23 Pac. 759. I. A statute expressly authorizing the former has been held unconstitutional for that reason. *People v. Cummings*, 88 Mich. 249, 50 N. W. 310. Another case, however, supports such a statute on the ground that an indefinite postponement of judgment is not a pardon, as it does not blot out guilt. *People ex rel. Forsyth v. Court of Sessions*, 141 N. Y. 288, 36 N. E. 386. And some courts regard this power as inherent in the court regardless of statutes. *People ex rel. Forsyth v. Court of Sessions*, *supra*; *State v. Crook*, 115 N. C. 760, 20 S. E. 513. Courts not recognizing the power generally hold that an indefinite suspension deprives the court of jurisdiction to sentence later. *United States v. Wilson*, 46 Fed. 748; *People v. Allen*, 155 Ill. 61, 39 N. E. 568. II. The power to stay the execution of a sentence once imposed has been generally denied. See *State v. Abbott*, 87 S. C. 466, 469, 70 S. E. 6. But the power to enforce it after such a stay has been frequently upheld. *State v. Abbott*, *supra*; *Neal v. State*, 104 Ga. 509, 30 S. E. 858. *Contra*, *Re Webb*, 89 Wis. 354, 62 N. W. 177. The number of cases seems to indicate a strong feeling on the part of the trial judges that they have power to suspend both sentence and execution.

INDIANS — RIGHT OF UNITED STATES TO SUE TO CANCEL CONVEYANCES MADE BY INDIANS CONTRARY TO STATUTE. — The United States by its Attorney General brought suit to cancel certain conveyances, made by Indians, of lands allotted to them under a statute which provided that such lands should be inalienable. *Held*, that the United States has capacity to sue. *Heckman v. United States*, 32 Sup. Ct. 424. See NOTES, p. 733.

INJUNCTIONS — ACTS RESTRAINED — RETENTION OF PUBLIC OFFICE BY CLAIMANT ACQUIRING POSSESSION FORCIBLY. — A constitutional provision consolidating two municipalities provided that the old charter of one of them should govern, as far as applicable, until the adoption of a new charter. The supreme court held the latter, first invalid, and then valid. Between the two decisions, the plaintiff was elected assessor under the old charter. One month after the second decision, and while the plaintiff continued to act, the defendant, claiming to be assessor under the new charter, forcibly deprived the plaintiff of the rooms and books of the assessor. *Held*, that the plaintiff is entitled to an injunction against their retention by the defendant. *Arnold v. Hills*, 121 Pac. 753 (Colo.).

Quo warranto is the appropriate remedy to try title to public office. *King v. Mayor of Colchester*, 2 T. R. 259. So, generally, such title cannot be determined in chancery proceedings. *People v. District Court*, 29 Colo. 277, 68 Pac. 224. However, on analogy to the jurisdiction of equity to enjoin a continuing trespass to tangible property, a claimant of an office should be subject to be enjoined from interfering with the one in possession of the office until the title has been tried at law. This is clearly true when the plaintiff is the *de jure* officer. *Poyntz v. Shackelford*, 107 Ky. 546, 54 S. W. 855. Similarly, if he is the *de facto* officer. *Seneca Nation of Indians v. Jameson*, 62 N. Y. Misc. 91, 114 N. Y. Supp. 401. Or if the defendant is *prima facie* not entitled to the office. *Hotchkiss v. Keck*, 86 Neb. 322, 125 N. W. 509. So, even though the court expresses no opinion as to the plaintiff's right to the office. *Rhodes v. Driver*, 69 Ark. 606, 65 S. W. 106. The court can make the injunction perpetual, if the rights of the parties are clear. *Elliott v. Burke*, 113 Ky. 479, 68 S. W. 445. An injunction will issue, though the plaintiff had previously ousted the defendant from possession. *Scott v. Sheehan*, 145 Cal. 691, 79 Pac. 353. But some courts, without determining the rights to the office, mandatorily enjoin, as in the principal case, a retention of possession which was taken by force. *Brady v. Sweetland*, 13 Kan. 41; *Blain v. Chippewa Circuit Judge*, 145 Mich. 59, 108 N. W. 440. This extension is not warranted by the analogy of trespass to tangible property and appears unnecessary under the circumstances of the principal case.

INSANE PERSONS — LIABILITY IN CONTRACT — RECOVERY OF MONEY ADVANCED TO LUNATIC. — A depositor became insane. The bank arranged with his son to continue the account and permit the son to draw checks as his father's agent. At the time of the lunatic's death, there was a considerable overdraft, which had been used to pay creditors for necessities. *Held*, that the bank is subrogated to the interest-bearing claims of these creditors, although it cannot recover directly either the money loaned or compensation for services. *In re Beavan*, [1912] 1 Ch. 196. See NOTES, p. 725.

INTERSTATE COMMERCE — CONTROL BY CONGRESS — RELATION OF FEDERAL EMPLOYERS' LIABILITY ACT TO INTRASTATE COMMERCE. — The plaintiff's intestate, employed by the defendant to switch cars moving in interstate and intrastate commerce indiscriminately, was killed while moving an intrastate train. *Held*, that the plaintiff may recover under the federal Employers'

Liability Act. *Behrens v. Illinois Central R. Co.*, 192 Fed. 581 (Dist. Ct., E. D. La.).

The court feels that the fact that the usual and ordinary employment of the decedent included interstate commerce gave him a status of one engaged in interstate commerce and so kept him continuously under the protection of the federal act. Another court has said, however, that an employee might well be subject to the act while engaged in interstate but not while engaged in intrastate commerce. See *Colasurdo v. Central R. of New Jersey*, 180 Fed. 832, 837. The few cases under the act seem to rest its applicability upon the character of the work in which the employee was engaged when injured. *Zikos v. Oregon R. & Navigation Co.*, 179 Fed. 893; *Taylor v. Southern Ry. Co.*, 178 Fed. 380. The recent decision of the Supreme Court, in holding that it is not essential that the train doing the injury should be interstate, seems to look merely to the work of the injured employee. *Second Employers' Liability Cases*, 32 Sup. Ct. 169. The Act of 1906 was declared unconstitutional because it applied to intrastate employees. *Employers' Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141. The construction maintained in the principal case would bring the scope of the present act extremely close to that of its predecessor.

INTERSTATE COMMERCE — WHAT CONSTITUTES INTERSTATE COMMERCE — INTRASTATE JUNCTION RAILWAY HANDLING CARS FOR INTERSTATE SHIPMENT. — A short railway, wholly within a state, switched with its own motive power on through bills of lading interstate carload freight from one trunk line to another, and from the trunk lines to the consignee's sidings. The trunk lines paid the railway by the car. *Held*, that the railway is subject to the provisions of the Interstate Commerce Act. *United States ex rel. Attorney General v. Union Stockyard & Transit Co.*, 192 Fed. 330 (Commerce Ct.).

A shipment is interstate if the shipper intends a single consignment from one state to another. *Cutting v. Florida Ry. & Navigation Co.*, 46 Fed. 641. See 20 HARV. L. REV. 652. That one of the connecting carriers participating is wholly within one state does not relieve it from interstate obligations. *The Daniel Ball*, 10 Wall. (U. S.) 557; *Norfolk and Western R. Co. v. Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. 958. This is true even though local bills of lading are issued for the shipment. *Houston Direct Navigation Co. v. Ins. Co. of North America*, 89 Tex. 1, 32 S. W. 889; *Texas & Pacific Ry. Co. v. Railroad Commission of Louisiana*, 183 Fed. 1005. But cf. *United States ex rel. Interstate Commerce Commission v. Chicago, etc. R. Co.*, 81 Fed. 783. Intrastate terminal companies handling interstate trains are within the act. *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 31 Sup. Ct. 279. Upon facts substantially similar to those in the principal case the federal Safety Appliance Act has been held applicable. *Union Stock Yards Co. v. United States*, 169 Fed. 404; *Belt Ry. Co. v. United States*, 168 Fed. 542. It has been suggested that that act is to be construed more broadly, because it regulates, not business, but mechanical instrumentalities with a view to the safety of workmen. See *United States v. Colorado & N. W. R. Co.*, 157 Fed. 321, 330. And before the amendment of 1906 the Commerce Act was thought to apply to a railroad within a state only when it handled interstate shipments under a common arrangement for continuous carriage. *United States v. Geddes*, 131 Fed. 452; *Cincinnati, etc. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 16 Sup. Ct. 700. The amendment makes the two acts define interstate railroads in the same terms. The principal case gives them a similar scope.

PARTNERSHIP — RIGHTS, DUTIES, AND LIABILITIES OF PARTNERS INTER SE — RIGHT OF PARTNER TO MAINTAIN TROVER FOR UNAUTHORIZED SALE

OF PARTNERSHIP PROPERTY. — A. and B. were co-partners. B., without the knowledge, consent, or authority of A., sold all the partnership property to C. *Held*, that A. may maintain trover against B. and C. *Weiss v. Weiss*, 133 N. Y. Supp. 1021 (Sup. Ct.)

One tenant in common cannot generally sue his co-tenant in trover for withholding use of the common property, since each has a right to possession. *Bohlen v. Arthurs*, 115 U. S. 482, 6 Sup. Ct. 114. See *Brown v. Hedges*, 1 Salk. 290. For a destruction of the chattel trover lies. *Herrin v. Eaton*, 13 Me. 193. In this country, the action is usually allowed even in the case of a sale by a co-tenant. *White v. Osborne*, 21 Wend. (N. Y.) 72; *Goell v. Morse*, 126 Mass. 480. But see *Mayhew v. Herrick*, 7 C. B. 229, 246. Whether the purchaser from the co-tenant is liable in trover is a question which has produced a conflict, but on principle it seems that each has been guilty of conversion in assuming to own the chattel and to deal with it as his own. *Weld v. Oliver*, 38 Mass. 559. *Contra*, *Osborne v. Schenck*, 83 N. Y. 201. Co-tenants, however, have no authority to sell the common property, whereas each partner may sell all the firm assets. See *Wilson v. Reed*, 3 Johns. (N. Y.) 175, 179; *Mabbett v. White*, 12 N. Y. 442. On this ground courts have held that one partner cannot sue another in trover for a sale of firm property. *Montjoys v. Holden*, Litt. Sel. Cas. (Ky.) 447; *Mason v. Tipton*, 4 Cal. 276. This reasoning seems insufficient, since the authority, as between the partners, is to sell only for partnership purposes. But the wrong is to the partnership. *Homer v. Wood*, 11 Cush. (Mass.) 62. Trover may prove inadequate, as there is no assurance that the fraudulent partner is not owed more by the firm than the damages from the wrong. See *Sweet v. Morrison*, 103 N. Y. 235, 241, 8 N. E. 396, 398. These rights can be adjusted satisfactorily only by an accounting in equity. See PARSONS, PARTNERSHIP, 4 ed., 304.

POWERS — INTENTION TO EXECUTE SPECIAL POWER. — The testatrix had a testamentary power of appointment among her children. By her will she gave, devised, bequeathed, and appointed her residuary real and personal estate (including all property over which she had a power of appointment) to trustees to pay debts and stand possessed of the residue in trust for her husband for life and then for her children equally. *Held*, that the power is not exercised by the will. *Re Sanderson*, 106 L. T. 26 (Eng., Ch. D., Feb. 9, 1912).

In order to exercise a testamentary power a will must, at common law, contain a sufficient reference to the power to show an intention to exercise it. The use of the verb "appoint," especially when coupled with the express inclusion, in a general gift, of "all property over which I have a power of appointment," would undoubtedly be a sufficient reference in the case of a general power. See *In re Richardson's Trusts*, L. R. 17 Ir. 436, 443. Such words also show an intention to execute a special power. *In re Mayhew*, [1901] 1 Ch. 677. But other parts of the will may tend to negative this intention. Thus putting the appointed property in a common fund with other property and providing for its conversion is not consistent with an intention to execute a special power. *In re Weston's Settlement*, [1906] 2 Ch. 620. So also if the gift is to others as well as to the objects of the power, or provides for payment of debts. *Ames v. Cadogan*, 12 Ch. D. 868. The English judges have differed as to whether these considerations outweigh the effect of the word "appoint." *In re Swinburne*, 27 Ch. D. 696; *In re Cotten*, 40 Ch. D. 41. The present case is one of the strictest.

RAILROADS — LIABILITY OF LESSOR RAILROAD FOR UNREASONABLE DISCRIMINATION BY LESSEE. — In an action of trespass for unreasonable discrimination in not granting the plaintiff siding facilities, the defendant corporation pleaded that prior to the alleged discrimination it had turned the entire management and control of its railroad over to another corporation

under a long lease authorized by the state, and that the discrimination was practised by the lessee alone. *Held*, that the plaintiff cannot recover. *Moser v. Philadelphia, H. & P. R. Co.*, 82 Atl. 362 (Pa.). See NOTES, p. 726.

RESTRAINT OF TRADE — SHERMAN ANTI-TRUST LAW — REGULATION OF MONOPOLY. — The defendant Terminal Railroad Association of St. Louis, owned by eight of twenty-four competing railroads, was a combination of independent terminal systems. By reason of topographical conditions, complete control over all possible terminal facilities was obtained. The terminal company consistently made arbitrary charges. The United States brought a bill in equity to enforce the provisions of the Sherman Act. *Held*, that the terminal association be not dissolved, if, (1) it admit any existing or future railroad to joint ownership and control, (2) provide for use of the terminal facilities on reasonable terms to railroads, and (3) cease its practices of arbitrary charges. *United States v. Terminal R. Association of St. Louis*, 32 Sup. Ct. 507. See NOTES, p. 717.

RULE AGAINST PERPETUITIES — TIME OF VESTING TOO REMOTE: WHETHER VESTING WILL BE ACCELERATED. — A testator left the residue of his estate to trustees, the same to vest in his grandchildren when the youngest of his living or after-born grandchildren arrived at the age of forty. An after-born grandchild was the youngest, and arrived at the age of twenty-one. The testator's children were still living. *Held*, that the grandchildren are not yet entitled to the estate. *Barker v. Eastman*, 82 Atl. 166 (N. H.).

This case is the result of a former decision under the same will. *Edgerly v. Barker*, 66 N. H. 434, 31 Atl. 900. It was there decided that this limitation to the grandchildren was not void, and the court expressed the opinion that the property would vest in the grandchildren when the youngest arrived at twenty-one, which would be at a period not too remote. See *Edgerly v. Barker*, 66 N. H. 434, 475, 31 Atl. 900, 916. Though this event has happened, yet the court in the principal case states that the property will not vest until the youngest grandchild attains forty, or the children of the testator die, whichever event happens first. No other court has followed the New Hampshire rule as to remoteness. *Cf. Hussey v. Sargent*, 116 Ky. 53, 75 S. W. 211. See 9 HARV. L. REV. 242.

SALES — CONDITIONAL SALES — EFFECT ON SELLER'S TITLE OF TRANSFER OF NOTES GIVEN FOR PRICE. — A seller sold an automobile on condition that title should remain in him until the promissory notes given for the price should be paid. The seller transferred the notes to the plaintiff, who, on the notes not being paid, sued in replevin for the automobile. *Held*, that the plaintiff can recover. *Zederman v. Thomson*, 121 Pac. 609 (N. M.).

For a discussion of the principles involved, see 25 HARV. L. REV. 462.

SPECIFIC PERFORMANCE — PARTIAL PERFORMANCE WITH COMPENSATION — REFUSAL OF WIFE TO RELEASE INCHOATE RIGHT OF DOWER. — In a suit for specific performance, the plaintiff joined the defendant's wife who was not a party to the contract. *Held*, that she is a proper party, for if she refuses to release dower and the plaintiff elects to accept partial performance with compensation, her inchoate right of dower must be valued and deducted from the purchase price. *O'Malley v. Miller*, 134 N. W. 840 (Wis.). See NOTES, p. 731.

TRADE UNIONS — INDUCING WORKMEN TO LEAVE OTHERWISE THAN BY STRIKE — PAYMENT OF MONEY TO NON-UNION EMPLOYEES. — The officials of a labor union ordered a strike to force the employer to recognize the union. Members of the union paid non-union employees bonuses to induce them to

leave the employment. *Held*, that the employer is entitled to an injunction. *Tunstall v. Stearns Coal Co.*, 192 Fed. 808 (C. C. A., Sixth Circ.).

For a discussion of the principles involved, see 20 HARV. L. REV. 267, 444; 21 HARV. L. REV. 635; 22 HARV. L. REV. 234.

TRUSTS — FOLLOWING TRUST PROPERTY — CESTUI'S RIGHTS WHEN TRUSTEE BUYS PROPERTY PARTLY WITH TRUST FUNDS. — The plaintiff gave her husband money to be used in part payment of the purchase price of land, there being an agreement that title was to be taken in the plaintiff. The husband took the title in his own name and incurred debts after the purchase. *Held*, that the plaintiff is not entitled to payment out of the proceeds of the land as against her husband's creditors. *Miller v. McLin*, 143 S. W. 1008 (Ky.).

Where a wife provides the entire purchase price of land to which her husband takes title, he holds it in trust for her. *Wright v. Wright*, 242 Ill. 71, 89 N. E. 789. When trust funds are mixed with the trustee's own money, and invested in a *res*, the decisions vary regarding the *cestui's* rights. The prevailing view is that there is, as against general creditors, a trust of an undivided share in the proportion in which the trust money contributed to the purchase. *Faylor v. Faylor*, 136 Cal. 92, 68 Pac. 482; *Mayer v. Kane*, 69 N. J. Eq. 733, 61 Atl. 374. Some states allow this only when the *cestui* stipulated for a distinct interest in the *res*. *Leary v. Corvin*, 181 N. Y. 222, 73 N. E. 984; *McGowan v. McGowan*, 14 Gray (Mass.) 119. The cases are numerous to the effect that when the mixed fund is deposited in a bank to the trustee's account, the *cestui* has an equitable charge on the *res* before the general creditors receive anything. *In re Hallett's Estate*, 13 Ch. D. 696; *National Bank v. Insurance Co.*, 104 U. S. 54; *City of Lincoln v. Morrison*, 64 Neb. 822, 90 N. W. 905. This view has been reached in some states only when the trust property can be traced into some specific *res*. *Lowe v. Jones*, 192 Mass. 94, 78 N. E. 402. But since the trustee should not be allowed to make any profit from manipulating the trust money, on principle it seems that the *cestui* should have the option of a charge, or a trust of a proportionate part of the *res*. This view has some authority. *Greene v. Haskell*, 5 R. I. 447; *Bitzer v. Bobo*, 39 Minn. 18, 38 N. W. 609. *Cf. Crawford v. Jones*, 163 Mo. 577, 63 S. W. 838. See 2 HARV. L. REV. 28; 19 HARV. L. REV. 511. The cases make no distinction between subsequent and prior creditors, such as is relied on in the principal case to vary the general rule.

VENDOR AND PURCHASER — REMEDIES OF VENDOR — ENFORCEABILITY OF IMPLIED LIEN WHEN STATUTE OF LIMITATIONS BARS DEBT. — A. conveyed land to B., taking a note for the price. The note remaining unpaid, A.'s representative instituted suit to enforce a vendor's implied lien. The Statute of Limitations had run on the note. *Held*, that the lien may not be enforced. *Shaylor v. Cloud*, 57 So. 666 (Fla.).

A vendor of real estate who conveys without stipulating for security has usually an implied equitable lien on the property conveyed to secure the purchase price. *Mackreth v. Symmons*, 15 Ves. Jr. 329; *Acton v. Waddington*, 46 N. J. Eq. 16, 18 Atl. 356. *Contra, Ahrend v. Odiorne*, 118 Mass. 261. It may be enforced at any time when an action might be brought on the debt. *Graves v. Coutant*, 31 N. J. Eq. 763. Even if the debt is barred by some technical defense, as infancy or coverture, the lien is good. *Crampton v. Prince*, 83 Ala. 246, 3 So. 519. *Cf. Smith v. Henkel*, 81 Va. 524. See 2 WARVELLE, VENDORS, 2 ed., § 706. It has been held that the same is true of the Statute of Limitations, on the ground that the statute only bars the legal remedy and that the principle that a lien subsists after the debt is barred applies here. *Hood v. Hammond*, 128 Ala. 569, 30 So. 540; *Baltimore & Ohio R. Co. v. Trimble*, 51 Md. 99. Other courts argue that since the lien is but an incident of the debt

it cannot survive its principal. *Borst v. Corey*, 15 N. Y. 505; *Waddell v. Carlock*, 41 Ark. 523. Where the seller retains title his security outlives the debt. *Evans v. Johnson*, 39 W. Va. 299, 19 S. E. 623; *Phillips v. Adams*, 78 Ala. 225. And where he conveys, expressly reserving a lien in the deed, courts have held likewise, regarding the transaction as an informal mortgage. *Hull's Admr. v. Hull's Heirs*, 35 W. Va. 155, 13 S. E. 49; *Coles v. Withers*, 33 Grat. (Va.) 186. *Contra*, *Chase v. Cartright*, 53 Ark. 358, 14 S. W. 90. But since equity has discretion in limiting equitable rights, it seems proper in the case of an implied lien, which is so closely connected with the legal debt, to apply the analogy of the legal Statute of Limitations, and the weight of authority supports this view. See 2 JONES, LIENS, § 1099; 2 WARVELLE, VENDORS, 2 ed., § 709. But see WOOD, LIMITATIONS, 3 ed., § 232.

WATERS AND WATERCOURSES — APPROPRIATION AND PRESCRIPTION — REASONABLENESS OF METHOD OF APPROPRIATION. — The plaintiff appropriated a certain portion of the flow of a river by means of a water-wheel. A subsequent appropriator built a dam which so backed up the water that there was no longer current enough to run the water-wheel. *Held*, that the plaintiff cannot recover. *Schodde v. Twin Falls Land and Water Co.*, U. S. Sup. Ct., Apr. 1, 1912.

By decision and by constitutional provision water-rights in Idaho must be determined by the doctrine of prior appropriation. *Drake v. Earhart*, 2 Idaho 750, 23 Pac. 541; IDAHO CONST., Art. 15, § 3. By this doctrine the right of the first appropriator for a beneficial use is unquestionable. *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443; *Morris v. Bean*, 146 Fed. 423. The method of appropriation must be a reasonably economical one. *Barnes v. Sabron*, 10 Nev. 217; *Court House, etc. Co. v. Willard*, 75 Neb. 408, 106 N. W. 463. Yet methods ordinarily used are upheld as reasonable, even though wasteful. *Barrows v. Fox*, 98 Cal. 63, 32 Pac. 811; *Rodgers v. Pitt*, 129 Fed. 932. The principal case involves the question whether a method is unreasonable merely because it necessitates preserving the present height of the water. Previous authority would seem, on the whole, to negative this proposition. *Cf. Cascade Town Co. v. Empire Water and Power Co.*, 181 Fed. 1011. See *Proctor v. Jennings*, 6 Nev. 83, 90. But *cf. Natoma Water and Mining Co. v. Hancock*, 101 Cal. 42, 35 Pac. 334. Later comers ought not to be allowed to force a prior appropriator to use very expensive methods of obtaining water. The use by him of a common method, like a water-wheel, can hardly be regarded as unreasonable. Yet unless it be so regarded, the decision of the principal case seems inconsistent with the appropriation theory.

WATERS AND WATER COURSES — TIDAL WATERS — NATURE OF STATE'S TITLE TO TIDE-FLOWED LANDS. — The state granted to the plaintiff railroad certain tide-flowed lands. *Held*, that the State Land Board should be enjoined from selling the lands to another to construct improvements in aid of navigation thereon, since the state has such an interest as can be passed to a private person. *Corvallis & E. R. Co. v. Benson*, 121 Pac. 418 (Or.).

For a discussion of the principles involved, see 18 HARV. L. REV. 341.

WILLS — CONSTRUCTION — CONDITION NOT TO CONTEST WILL. — A will provided that if any beneficiary entered suit to break it he should have five dollars only and his share should be divided among others. The plaintiff, one of the beneficiaries, unsuccessfully contested probate on the ground of forgery. *Held*, that there is no forfeiture. *Rouse v. Branch*, 74 S. E. 133 (S. C.).

In England it has been held that no public policy forbids enforcing a condition forfeiting a devise for contesting the testator's competency. *Cooke v. Turner*, 15 M. & W. 727. As to personalty, however, a contest based on prob-

able cause will not be allowed to work a forfeiture. *Powell v. Morgan*, 2 Vern. 90; *Morris v. Burroughs*, 1 Atk. 399. But this applies only when there is no gift over. *Cleaver v. Spurling*, 2 P. Wms. 526; *Stevenson v. Abington*, 11 Wkly. Rep. 935. In this country, the tendency is to hold the condition valid without distinction between realty or personalty or as to gifts over. *Thompson v. Gaut*, 14 Lea (Tenn.) 310; *Matter of Estate of Hite*, 155 Cal. 436, 101 Pac. 443. Accordingly several courts have said that the law puts no restriction on a testator's right to make his bounty conditional upon abstention from litigation. *Donegan v. Wade*, 70 Ala. 501; *Matter of Estate of Garcelon*, 104 Cal. 570, 38 Pac. 414. Others, on the ground of public policy, to prevent wrongdoers in cases of undue influence or incompetency from dictating such terms as to stifle investigation, have arbitrarily construed all conditions not to apply to contests based on probable cause. *Jackson v. Westerfield*, 61 How. Pr. (N. Y.) 399; *Friend's Estate*, 209 Pa. St. 442, 58 Atl. 853. Whether or not this encroachment on freedom of disposition is warranted to its full extent, it would seem, as held in the principal case, to be justifiable in cases of alleged forgery, where the social interest is more obvious. But cf. *Moran v. Moran*, 144 Ia. 451, 123 N. W. 202.

WITNESSES — COMPETENCY AS TO PARTICULAR MATTERS — COMPETENCY OF HUSBAND AND WIFE TO BASTARDIZE ISSUE. — A husband's petition for annulment of marriage having been granted, the wife filed a cross-petition for the support of a child, conceived before marriage but born thereafter. The husband offered to testify that he was not the father of the child. *Held*, that he is not a competent witness. *Palmer v. Palmer*, 82 Atl. 358 (N. J., Ct. Ch.).

Originally, the testimony of husband and wife to non-access for the purpose of bastardizing the wife's issue was admissible, but required corroboration in certain cases. *Parish of St. Andrew v. Parish of St. Bride*, 1 Sess. Cas. K. B. 117. See *King v. Reading*, Cas. t. Hardw. 79, 82. Lord Mansfield altered the rule to one of incompetency. See *Goodright v. Moss*, 2 Cowp. 591, 594. In this form it became well established both in England and in America. *King v. Sourton*, 5 A. & E. 180; *Egbert v. Greenwalt*, 44 Mich. 245, 6 N. W. 654; *Tioga County v. South Creek Township*, 75 Pa. St. 433. The recent English cases, however, show some tendency to restore the earlier law. *In re Yearwood's Trusts*, 5 Ch. D. 545. But see *Aylesford Peerage*, 11 App. Cas. 1, 9. Furthermore the rule, if still in existence in England, is restricted to children begotten as well as born after marriage, which qualification does not exist in America. *Poulett Peerage*, [1903] App. Cas. 395; *Rabeke v. Baer*, 115 Mich. 328, 73 N. W. 242. In the principal case, the marriage having been annulled, the child would, in any event, be illegitimate at common law. *Plant v. Taylor*, 7 H. & N. 211. See *Zule v. Zule*, 1 N. J. Eq. 96, 100. A New Jersey statute, however, legitimizes the issue of annulled marriages. LAWS OF N. J. OF 1907, c. 216, § 1, cl. vi. The court is probably correct in holding that the rule, as laid down in America, applies to this situation. The strongest argument in favor of the rule, the unfairness to the child of permitting its parents to deprive it of its legal status seems as applicable here as elsewhere. But the rule itself is anomalous, and the arguments in its support are insufficient. See 3 WIGMORE, EVIDENCE, § 2064.

BOOK REVIEWS.

THE ORIGIN AND GROWTH OF THE AMERICAN CONSTITUTION. By Hannis Taylor. Boston: Houghton Mifflin Company. 1911. pp. xlii, 676.

The sub-title describes this book as "an historical treatise in which the documentary evidence as to the making of the entirely new plan of federal government embodied in the existing Constitution of the United States is, for the first time, set forth as a complete and consistent whole." The words "the entirely new plan" in this sub-title are an allusion to Alexis de Tocqueville's statement, quoted on p. 2, that our present Constitution is based "upon a wholly novel theory which may be considered a great discovery in modern political science . . . that the Federal Government should not only dictate but should execute its own enactments."

It is the view of this book, expressed emphatically in very many places, that for this great discovery the world is indebted to an anonymous pamphlet by Pelatiah Webster, a well-educated merchant of Philadelphia. The pamphlet in question is reprinted in the appendix (p. 526), where it receives from Mr. Taylor the sub-title of "The epoch-making draft of Pelatiah Webster, of February 16, 1783, in which is embodied the first draft of the existing Constitution of the United States." It ought to be read. It contains many suggestions, some of which have not been followed. There is, for example, a suggestion that Congress should be aided by a chamber composed of merchants — a view that may or may not have connection with Pelatiah Webster's own mercantile occupation. There is also a suggestion that in an emergency Congress should choose "a dictator who should have and exercise the whole power of both houses till such time as they should be able to concur in displacing him." There is also a suggestion that

"every person whatever, whether in public or private character, who shall by public vote or overt act disobey the supreme authority, shall be amenable to Congress, shall be summoned and compelled to appear before Congress and, on due conviction, suffer such fine, imprisonment, or other punishment as the supreme authority shall judge requisite."

Obviously Pelatiah Webster laid little emphasis on the division of powers into legislative, executive, and judicial; and obviously, too, he had no objection to bills of attainder and the like. Yet it would be a mistake to suppose that the whole of the pamphlet is composed of such matter as the extracts just now given. At the beginning are passages quite in harmony with the provisions ultimately inserted in the Constitution. The difficulty is in proving that in these matters Pelatiah Webster had priority.

Mr. Taylor does not appear to appreciate this difficulty fully. His readers, if acquainted with the subject, open his book with the impression that February 16, 1783, was a rather late date for anyone to form views indicating the inadequacy of the Articles of Confederation and the necessity of creating a central government of larger power. Bancroft has taught that at least ever since the appearance of Thomas Paine's *Common Sense*, in 1776, such ideas were common property.¹ Certain it is that such views were elaborated before February 16, 1783. That is clear from an examination of the writings of Alexander Hamilton — writings into which it is peculiarly worth while to look, because Hamilton, besides being a thinker of originality, was long General Washington's secretary, and as an incident of that service heard and read the views of many. On September 3, 1780, even before the Articles of Confederation had gone into effect, Hamilton wrote:

¹ History of the Constitution, Vol. I, p. 10.

"The fundamental defect is a want of power in Congress. It is hardly worth while to show in what this consists, as it seems to be universally acknowledged."

He proceeded to particularize that the Confederation "gives the power of the purse too entirely to the State Legislatures"; and then he suggested "calling immediately a Convention of all the States" and granting to Congress "completé sovereignty in all that relates to war, peace, trade, finance, . . . duties, . . . coining money," etc.² The details are much the same as those which are found in Pelatiah Webster's pamphlet of 1783, and they should be carefully examined by anyone interested in this question of priority.

All that Mr. Taylor says in his text (p. 192) as to this paper of Hamilton's is that Hamilton

"was one of the first to entertain the thought, even though he did not express it publicly, that a Federal Convention should be called for the purpose of making an entirely new Constitution,"

with the foot-note:

"See his private letter to James Duane of Sept. 3, 1780, referred to in Gaillard Hunt's *Life of James Madison*, 108."

The paper by Hamilton was indeed a letter; but it is of consequence nevertheless, when one is discussing originality and priority, and, besides, a glance at the document shows clearly enough that to dismiss it as a mere private letter is to move rather alertly. The letter covers twenty-seven printed pages. It was written by Hamilton when secretary of General Washington. It was addressed to James Duane, Member of Congress — later a member of the Federal Constitutional Convention. It suggested, among other things, matters on which immediate action was wished by General Washington, and on which prompt action was in fact had. In short, it was a document meant to be used for public purposes. It may not have been seen by Pelatiah Webster; but Congress was sitting in Philadelphia, and as to Pelatiah Webster, according to an authority quoted by Mr. Taylor (p. 163, n. 1),

"it is a matter of tradition that members of Congress . . . were in the habit of passing the evening with him, to consult him upon financial and political concerns."

Again, as Mr. Taylor emphasizes the distinction between manuscript and print, it is worth noticing that in a paper — one of a series entitled *The Continentalist* — published by Loudon's New York Packet Company, Hamilton, under date of August 30, 1781, repeated that

"it is necessary to augment the powers of the Confederation," and that there must be "throughout the United States" taxes "granted to the Federal Government in perpetuity, and, if Congress think proper, to be levied by their own collectors," for the reason that: "The great defect of the Confederation is, that it gives the United States no property; or, in other words, no revenue, nor the means of acquiring it, inherent in themselves and independent of the pleasure of the different members. And power without revenue, in political society, is a name."³

Mr. Taylor seems not to cite this paper.

Still again, on July 21, 1782, the New York Resolutions for a General Convention of the States, probably written by Hamilton,⁴ showed a public movement before the date of Pelatiah Webster's pamphlet.

Further, on January 27 and January 28, 1783, Hamilton, as member of Congress, made speeches in favor of the collection of taxes by the Federal Government.⁵

Finally, on February 12, 1783, — four days before the date assigned to Pelatiah Webster's pamphlet, — Congress, in accordance with a committee report said to have been presented on January 25 by Hamilton, passed a resolution in favor of

"the establishment of permanent and adequate funds to operate generally throughout the United States, to be collected by Congress."⁶

² Hamilton's Works, Lodge's 1904 ed., Vol. I, p. 213.

⁴ *Ibid.*, p. 291.

⁵ *Ibid.*, pp. 299-301.

³ *Ibid.*, p. 261.

⁶ *Ibid.*, p. 301.

It is true that Mr. Taylor thinks that at a considerably earlier date than 1783 Pelatiah Webster entered upon the scene, not with a plan of government, but with a suggestion of a general convention for the framing of a new Constitution. In the Madison Papers, in a statement made apparently late in the life of James Madison, it is written:

"A resort to a general convention to remodel the Confederacy was not a new idea. It had entered at an early date into the conversations and speculations of the most reflecting and foreseeing observers of the inadequacy of the powers allowed to Congress. In a pamphlet published in May, 1781, at the seat of Congress, Pelatiah Webster, an able though not conspicuous citizen, . . . remarks that 'the authority of Congress at present is very inadequate to the performance of their duties; and this indicates the necessity of their calling a *continental convention*, for the express purpose of ascertaining, defining, enlarging, and limiting, the duties and powers of their Constitution.'"

Madison, it seems, afterwards struck out the words "an able."⁸ Mr. Taylor interprets Madison as saying that, among the early suggesters of a convention, the author of the pamphlet "was the first" (p. 27), and apparently knows nothing of the possible change in Madison's estimate of Pelatiah Webster. As to the pamphlet, Bancroft says:⁹

"Not by Pelatiah Webster, as stated by Madison. . . . First: at a later period, Webster collected his pamphlets in a volume, and this one is not among them; a disclaimer which, under the circumstances, is conclusive. Secondly: the style of this pamphlet of 1781 is totally unlike the style of those collected by Pelatiah Webster. My friend F. D. Stone of Philadelphia was good enough to communicate to me the bill for printing the pamphlet; it was made out against William Barton and paid by him. Further: Barton from time to time wrote pamphlets, of which, on a careful comparison, the style, language, and forms of expression are found to correspond to this pamphlet published in 1781. Without doubt it was written by William Barton."

Mr. Taylor does not reprint this pamphlet and does not quote Bancroft, but says (p. 27, n. 1):

"No attention should be paid to Bancroft's vain attempt to discredit Madison's statement. History of the Constitution, Vol. I, p. 24, n. 3. Apart from Madison's great accuracy and Bancroft's well-known inaccuracy stands the fact that the call of 1781 was a natural part of Pelatiah Webster's initiative as now understood. Madison was on the ground and knew the facts; Bancroft's inference is based on flimsy hearsay nearly a century after the event."

As Mr. Taylor's title page emphasizes his intention that this book be regarded as "an historical treatise," this review has been confined to describing Mr. Taylor's chief contention and to indicating that in this book Mr. Taylor has hardly succeeded fully in his attempt to convince readers of Pelatiah Webster's right to something like canonization. One thing is certain, namely, that when Alexander Hamilton framed the plan which he presented to the Federal Constitutional Convention in 1787, he personally had no need to go to Pelatiah Webster's pamphlet of 1783 for the ideas which Alexander Hamilton himself — acting principally, it may be, as a skilful transcriber of views widely prevalent — had reduced to writing in 1780.

THE INDIVIDUALIZATION OF PUNISHMENT. By Raymond Saleilles. With an introduction by Gabriel Tarde. Translated by Rachel Szold Jastrow. With an introduction by Roscoe Pound. Boston: Little, Brown and Company. 1911. pp. xlv, 322.

This book is the fourth of the foreign treatises in the modern Criminal Science Series now being translated into English and published under the auspices of the American Institute of Criminal Law and Criminology. It consists of a series of popular lectures delivered before the College of Social Science

⁷ Elliot's Debates, 1845 ed., Vol. V., p. 117.

⁸ Documentary History of the Constitution, 1900 ed., Vol. III, p. 796 g.

⁹ History of the Constitution, Vol. I, p. 24, n. 3.

at Paris in 1898. While the present translation is from the second edition in 1908, the text of the lectures remains substantially unchanged. As stated by the author, when beginning the preparation of the second edition, he

"decided to retain the chapters which had their initiative ten years ago, and to look upon them somewhat as an expression of the period, as reflecting a phase of legal thought; for therein lies their value. In themselves they may now have but slight value; as an historical document, they may still be of use."

As an exposition of the current thought of the time with respect to crime and its treatment, the present translation will be of much service to all interested in the scientific improvement of the criminal law. The value of the book is greatly enhanced by the suggestive introduction by Professor Pound, who points out that after all the movement for individualization in the criminal law is but a phase of the general movement for individualizing the application of all legal rules; that in the criminal law the aim should be to achieve what has been achieved in our courts of equity, a system of legal individualization.

The first chapter is devoted to a statement of the problem. This is followed by a history of punishment, which while rather general and cursory, is sufficient, considering the author's purpose. Then comes a review and criticism of the various schools of criminology; the classic school; the neo-classic school and individualization based upon responsibility; the Italian school and individualization based upon formidability. This review of the position of the various schools is illuminating, and in reasonably brief compass gives the reader a good general notion of the situation. Two chapters are devoted to the doctrine of responsibility, and responsibility and individualization, in which he discusses the position of the classic school and its doctrine of free will and the position of the Italian school and its theory of determinism, and then proposes a mediating view, namely: Responsibility as the basis of punishment and individualization as the criterion of its application.

"The conception of punishment implies responsibility. One must believe in responsibility in order that a measure taken against an offender shall be a punishment. But the application of punishment is no longer a matter of responsibility but of individualization. It is the crime that is punished; but it is the consideration of the individual that determines the kind of treatment appropriate to his case."

The remaining chapters are devoted to a system of legal, judicial, and administrative individualization based upon the mediating view thus announced. In the application of the penalty the latent and potential criminality as well as the criminality actually manifested by action should be considered. The treatment to be applied should be based upon a consideration of what the offender is, as well as upon a consideration of what he has done; thus requiring that the criminal law should seek to develop and strengthen moral character as well as regulate and punish conduct.

E. A. G.

CAPTURE IN WAR ON LAND AND SEA. By Hans Wehberg. Translated from *Das Beuterecht im Land- und Seekriege*. With an introduction by John M. Robertson. London: P. S. King and Son. 1911. pp. xxxv, 210.

The principle of naval warfare permitting a belligerent to seize an enemy's shipping, though privately owned, and this not to aid in carrying on the operations of war, but merely to enrich the captured state, has long been under attack. Dr. Wehberg has written in the present volume an exhaustive argument against this law of prize. Somewhat the larger portion of the work is given to exposition and analysis of the present law in regard to capture of both private and public property on land and on sea. One feels, however, that this is but introductory to the argumentative portion of the work.

The author says that the rule is anomalous, as private property is on land

subjected only to the necessities of war, while the character of the law of prize is plainly indicated by the fact that most powers assign prize money in whole or in part to the crew of the capturing vessel; and argues that as war has come to be recognized as creating "legal relations" between states and not between individuals, it should follow that on sea as on land the property rights of an enemy's subject should be violated only in case of military necessity. To the fact that the law of capture at sea really applies to enemies' commerce as distinguished from mere property, Dr. Wehberg replies that while the enemy's merchant marine may be crippled its commerce may be preserved by the use of neutral shipping, and examines the experience of a long series of wars to demonstrate that the exercise of this right of capture has never been decisive of any war, and is not necessarily indicative of the result.

Mr. Robertson in the introduction joins with great emphasis in Dr. Wehberg's position that England, which has been the leading supporter of the law of prize, is, because of its great shipping interests, the most interested in its abolition. Mr. Robertson also feels that the step he advocates would check the tendency to excessive armaments and would tend to prevent warfare. Indeed, he advocates the abolition of the law of prize as an agreement to be made in connection with an agreement limiting armaments.

Though we may not feel as strongly as do Dr. Wehberg and Mr. Robertson that the retention of the law of prize is plainly indefensible and clearly contrary to the selfish interest of England, we are nevertheless indebted to them for a forceful presentation of the considerations in favor of the traditional position of the United States of America.

A. R. G.

NEUTRALIZATION. By Cyrus French Wicker. London: Oxford University Press. 1911. pp. viii, 91.

This small volume is divided into four parts: I. Analysis of permanent neutrality; II. Treaties of neutralization; III. Effects of neutralization; IV. The United States and neutralization. A bibliography is appended. The book is readable and interesting. For present purposes the most important passages are those in which it is pointed out that neutralization is not inconsistent with fortification and defense, that the United States can fortify the Panama Canal, and that the neutralization of the Panama Canal is a matter to which as yet only a small part of the world has assented (pp. 2, 43-47, 54, 57, 80). There is also a suggestive discussion of a possible neutralization of the Philippines (pp. 83-88). One small slip has been discovered — a misstatement of the position taken by Austria when Bismarck threatened a breach of the neutrality of Luxembourg (p. 8), but at a later place (p. 62) it is properly said that Austria joined Great Britain in protest,¹ and at any rate a small slip as to history does not essentially detract from the value of the book as a clear and rational discussion of a timely topic.

PRINCIPLES OF THE CONSTITUTIONAL LAW OF THE UNITED STATES. By Westel W. Willoughby. New York: Baker, Voorhis and Company. 1912. pp. l, 576.

This is an abridgment of the author's two-volume treatise, entitled *The Constitutional Law of the United States*, which was reviewed in the *HARVARD LAW REVIEW*, vol. 24, p. 587. The abridgment has been made so skilfully that it is, like the original work, interesting and well-proportioned. There

¹ Wheaton's *International Law*, Atlay's ed., § 422 a.

is adequate citation of authorities. The abridgment is, indeed, such a useful book that even a reader of the larger work would do well to read this one also, either by way of introduction or by way of review.

THE LAWS OF ENGLAND. By the Right Honorable the Earl of Halsbury and other lawyers. London: Butterworth and Company. Rochester, N. Y.: Lawyers' Coöperative Publishing Company.

Vol. XVIII. Intoxicating Liquors to Libel and Slander. 1911. pp. ccxix, 746, 63.

Vol. XIX. Lien to Malicious Prosecution. 1911. pp. ccviii, 702, 59.

Supplement to Vols. I to XVII. 1911. pp. lvii, 353.

Vol. XVIII contains articles on Intoxicating Liquors (including licensing, offenses, and reformatories: 172 pages); Judgments (47 pages); Juries (47 pages); Land improvement (30 pages); Land tax (23 pages); Landlord and Tenant (270 pages); Libel and Slander (144 pages).

Vol. XIX contains articles on Lien (32 pages); Limitation of Actions (160 pages); Literary and Scientific Institutions (20 pages); Loan Societies (10 pages); Local Government (160 pages); Lunatics (142 pages); Magistrates (130 pages); Malicious Prosecution and Procedure (31 pages).

The Supplement brings the citation of statutes and cases in the articles contained in the first seventeen volumes down to October 12, 1911.

A glance at the contents of these volumes will show their importance and value. While some of the articles are of merely British interest, others, like the valuable articles on Judgments, Landlord and Tenant, Libel and Slander, Limitation of Actions, and Malicious Prosecution, are for the benefit of the American as well as of the English lawyer. These, like all the articles, have been put into the hands of competent authors, and are well done. These two volumes contain also articles of great interest to the student of government, economics, and sociology. Such are, for instance, the articles on Intoxicating Liquors, Land Tax, Local Government, Lunatics, and Magistrates. The article on Local Government, for instance, gives a clear idea of the condition of local government throughout England; and has this advantage over ordinary books on local government, that it cites statute or case for each statement.

As the work progresses it becomes possible to state with increasing emphasis the success of the projectors in maintaining the high quality of the articles.

J. H. B.

THE ORIGIN OF THE ENGLISH CONSTITUTION. By George Burton Adams. New Haven: Yale University Press. London: Henry Frowde. Oxford University Press. 1912. pp. xii, 378.

HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS. By Henry Campbell Black. St. Paul: West Publishing Company. 1912. pp. xv, 768.

AN ANALYSIS OF SNELL'S PRINCIPLES OF EQUITY. By E. E. Blythe. London: Stevens and Haynes. 1912. pp. xx, 248.

COMPARATIVE LEGAL PHILOSOPHY APPLIED TO LEGAL INSTITUTIONS. By Luigi Miraglia. Translated by John Lisle. With an introduction by Albert Kocourek. Boston: The Boston Book Company. 1912. pp. xl, 793.

CRIMINAL RESPONSIBILITY AND SOCIAL CONSTRAINT. By Ray Madding McConnell. New York: Charles Scribners' Sons. 1912. pp. vi, 339.

- THE GENIUS OF THE COMMON LAW. By The Right Honorable Sir Frederick Pollock, Bart. New York: The Columbia University Press. 1912. pp. vii, 141.
- ARGUMENT OF THE HONORABLE ELIHU ROOT BEFORE THE NORTH ATLANTIC COAST FISHERIES ARBITRATION TRIBUNAL. Edited by James B. Scott. Boston: The World Peace Foundation. 1912. pp. cli, 523.
- THE DISTINCTIONS AND ANOMALIES ARISING OUT OF THE EQUITABLE DOCTRINE OF THE LEGAL ESTATE. By R. M. P. Willoughby. Cambridge, England: The University Press. 1912. pp. xx, 118.
- A DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY. Washington: Government Printing Office. 1912. pp. 1103.
- FOREIGN COMPANIES AND OTHER CORPORATIONS. By E. Hilton Young. Cambridge, England: The University Press. New York: G. P. Putnam's Sons. 1912. pp. xii, 332.

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